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In The

Supreme Court of the United States

October Term, 1997

KENTUCKY RIGHT TO LIFE, INC.; KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE, ROBERT ZOELLER; and LORA ROBERTSON, Treasurer of Kentucky Right To Life Political Action Committee,

Petitioners,

v.

DAVID STENGEL, as Commonwealth's Attorney for Jefferson County, Kentucky, and as a representative of the class of Commonwealth's Attorneys in the State of Kentucky; A.B. CHANDLER, II, as Attorney General of the State of Kentucky; JOSEPH H. TERRY, as Chairman of the Registry of Election Finance of the State of Kentucky; CAROLINE S. BRATT, as a member of the Registry of Election Finance; VICTOR B. MADDOX, as a member of the Registry of Election Finance; GEOFFREY C. RALSTON, as a member of the Registry of Election Finance; WILLIAM T. WARNER, as a member of the Registry of Election Finance; BRENDA W. WILLOUGHBY, as a member of the Registry of Election Finance; and BETTY JOE WINTERS, as a member of the Registry of Election Finance, all in their official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI OF KENTUCKY RIGHT TO LIFE, INC., KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE, ROBERT ZOELLER AND LORA ROBERTSON

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112 pp

QUESTIONS DEALT WITH HEREIN

1. This Court has stated that when the Government regulates speech, it must factually demonstrate that the harm is real, and that the regulation will actually alleviate it. In this case, Kentucky imposed a $1,500 aggregate limit on contributions to all political action committees (PACs). As a result, it prohibited Petitioner Zoeller from contributing *any* money to Petitioner Kentucky Right To Life Political Action Committee (KRLPAC) because he had already contributed a total of $1,500 to *other* PACs. May Kentucky, consistent with the First and Fourteenth Amendments, completely prohibit Mr. Zoeller from making any contributions to KRLPAC, because he has contributed $1,500 to other PACs, without any evidence or legislative findings that: a) PACs are so inherently corrupting that drastically curtailing – and in some cases completely prohibiting – people from associating with them advances a compelling state interest; and b) it is only employing narrowly tailored means to advance this interest?

2. In *Buckley v. Valeo,* this Court held that the compelling interest which supports restricting contributions is preventing the *quid pro quo* corruption that may result from large, individual contributions to current and potential officeholders. Because this interest is predicated upon *large* contributions *to candidates,* is it constitutional under the First and Fourteenth Amendments for Kentucky to impose a $1,500 aggregate contribution limit to PACs, thereby prohibiting Petitioner Zoeller from making *any* contributions – *not* just large contributions – to Petitioner KRLPAC – a PAC, *not* a candidate?

3. In *Citizens Against Rent Control v. City Of Berkeley,* this Court noted that discriminating against persons simply because they band together to advance their views violates the right to freely associate. Discriminating against

QUESTIONS DEALT WITH HEREIN – Continued

certain groups also deprives persons and groups of the equal protection of the laws. In this case, Kentucky has prohibited Mr. Zoeller and KRLPAC from banding together to advance their political views; however, it does not similarly prohibit Mr. Zoeller from banding together either with political parties or with candidates. Has Kentucky thus violated the rights of Mr. Zoeller and KRLPAC to speak, to freely associate and to the equal protection of the laws?

4. This Court has stated that when a case becomes moot pending appeal, the practice is to vacate the judgment below and direct the lower court to dismiss the case; the reason for this practice is so the loser may relitigate the judgment if the case becomes justiciable again. During the appeal to the circuit court in this case, the State amended the language upon which the Plaintiffs below based several of their statutory challenges, thus mooting them. Did the circuit court err by failing to vacate the district court's judgment upholding the prior versions of these statutes so that the Plaintiffs below could challenge these statutes if the State reenacted them?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party that is listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The unreported order of the court of appeals denying the petition for rehearing is reproduced in the Appendix filed herewith ("App.") at App. 56. The opinion of the court of appeals affirming the judgment of the district court is reported at 108 F.3d 637 (6th Cir. 1997), and is reproduced at App. 1.

The unreported opinion of the district court disposing of the action on its merits is reproduced at App. 34. The unreported order of the district court, *inter alia,* consolidating the Petitioners' motion for a preliminary injunction with a trial on the merits is reproduced at App. 54. The unreported final order of the district court is reproduced at App. 55.

STATEMENT OF JURISDICTION

The court of appeals filed its opinion and judgment on March 7, 1997. App. 1. The Petitioners timely filed a petition for rehearing. The circuit court denied this petition on April 7, 1997. App. 56. The Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the relevant provisions in Chapter 121, "Campaign Finance Regulation," and Chapter 121A. "Public Financing Campaign Act," of the Kentucky Revised Statutes Annotated are set forth in the Appendix beginning at App. 57.

STATEMENT OF THE CASE

Petitioner Kentucky Right To Life, Inc. (KRL), is a statewide, non-profit membership corporation, incorporated in the

State of Kentucky, with local chapters throughout the State. It is exempt from federal income tax under 26 U.S.C. § 501 (c)(4). It is not associated with any political candidate, political party, or campaign committee. Its purposes are to educate the public on issues relating to abortion, to restore protection of the right to life for unborn children, and to promote the sanctity of all innocent life.

To further its ideological and political goals, KRL has established a separate, internal PAC under Kentucky election law, *see* Ky. Rev. Stat. Ann. § 121.015(3)(c) (Michie Supp. 1996), Petitioner Kentucky Right To Life Political Action Committee (KRLPAC). KRLPAC makes political contributions to state candidates for statewide and legislative offices and makes independent expenditures for and against such candidates. Petitioner Lora Robertson is Treasurer of KRLPAC.

Petitioner Robert Zoeller is a resident of the State of Kentucky who has in the past contributed to KRLPAC. Mr. Zoeller intended to contribute to KRLPAC in the 1995 election in Kentucky. However, Kentucky law prohibited him from doing so because he had, for purposes of the 1995 election, already contributed a total of $1,500 to *other* PACs. To avoid breaking Kentucky law, Mr. Zoeller did not make any contributions to KRLPAC.

A. Aggregate PAC Contribution Limits In Ky. Rev. Stat. Ann. § 121.150(10) And Other Pertinent Contribution Limits.

The statute at issue, Ky. Rev. Stat. Ann. § 121.150(10), provides that "[n]o person shall contribute more than one thousand five hundred dollars ($1,500) to all permanent committees and contributing organizations in any one (1) year" (Michie Supp. 1996). App. 59. While Kentucky thus limits aggregate contributions to PACs, it does not limit aggregate contributions to political parties.[1]

Kentucky also limits individual and PAC contributions to candidates to $1,000. Ky. Rev. Stat. Ann. § 121.150(6) (Michie

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[1] Ky. Rev. Stat. Ann. § 121.150(11) limits individual contributions to a political party to $2,500; contributions to parties above $1,000 may only be used to pay administrative costs. (Michie Supp. 1996). App. 59.

Supp. 1996). App. 58. It prohibits individuals and PACs from evading this $1,000 contribution limit by "earmarking" contributions: contributing funds to a PAC and then directing the PAC to contribute these funds to a candidate. *Id.* at § 121.150(8), (9) (Michie Supp. 1996). App. 59.

B. Proceedings Below

On August 22, 1995, the Petitioners (Plaintiffs below) filed their *Verified Complaint* for declaratory and injunctive relief challenging Ky. Rev. Stat. Ann. § 121.150(10) and other Kentucky election laws.[2] Their claims were based upon 42

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[2] The Plaintiffs also challenged Ky. Rev. Stat. Ann. §§ 121.025, alleging that its prohibition on corporate contributions prohibited KRL from making direct contributions and that this statute, coupled with the overbroad definitions of "permanent committee" and "contribution" in Ky. Rev. Stat. Ann. §§ 121.015(3)(c) and 121.015(6)(e), respectively, prohibited KRL from making independent and issue advocacy expenditures (App. 6); they challenged Ky. Rev. Stat. Ann. § 121.180(6)(a), alleging that its registration requirement for "permanent committees," coupled with the overbroad definition of "permanent committee," required KRL to register as a PAC (App. 6); they challenged the 5% administrative fee on all PAC expenditures in Ky. Rev. Stat. Ann. § 121.180(6)(b) (App. 37); they challenged Ky. Rev. Stat. Ann. § 121.035(2), alleging that its prohibition on corporate employees "handling" funds that might directly or indirectly advance candidates, prevented KRL from making independent and issue advocacy expenditures (App. 7); they challenged Ky. Rev. Stat. Ann. § 121.190(1), alleging that its prohibition on anonymous materials that were "intended for the support or defeat of candidates" prevented KRL from making anonymous independent and issue advocacy expenditures (App. 7); they challenged Ky. Rev. Stat. Ann. §§ 121.150(6) and 121A.050(1), alleging that their $500 contribution limits violated the rights of KRL and KRLPAC to make direct contributions (App. 8), and that these statutes, coupled with the overbroad definitions of "permanent committee" and "contribution" in Chapters 121 (*supra*) and 121A (*see* definitions of "permanent committee" in Ky. Rev. Stat. Ann. §§ 121A.010(9)(c) and "contribution" in 121A.010(11)(a)(5)), limited KRL's ability to make independent and issue advocacy expenditures (App. 8); and they challenged the prohibition in Ky. Rev. Stat. Ann. § 121A.030(4) on candidates for Governor and Lieutenant

U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343, and the First and Fourteenth Amendments to the Constitution of the United States. Because the 1995 elections for statewide and legislative office in Kentucky were fast approaching, and these provisions reduced the Plaintiffs' abilities to participate in them, they moved the Court to preliminarily enjoin their enforcement.

The State denied that a case or controversy existed with respect to some of these challenges.[3] More specifically, the State asserted that it did not interpret these provisions in accord with their (allegedly overbroad) plain language. It moved to dismiss the Plaintiffs' claims as to these statutes with prejudice. With respect to the Plaintiffs' other challenges, including their challenge to Ky. Rev. Stat. Ann. § 121.150(10) (Banks-Baldwin 1995), the State acknowledged that a case or controversy existed, but maintained that these remaining provisions were constitutional.[4] The State moved for summary judgment as to these claims. App. 54.

Governor receiving contributions from PACs that exceeded 25% of all their contributions (App. 9). (Banks-Baldwin 1995) (*amended by* Ky. Rev. Stat. Ann. §§ 121.015(3)(c)-121.190(1) and §§ 121A.010(9)(c)-121A.050(1) (Banks-Baldwin 1996 Acts Issue)).

[3] These were the Plaintiffs' challenges to Ky. Rev. Stat. Ann. § 121.190(1) on the ground that it regulated issue advocacy; their challenges to Ky. Rev. Stat. Ann. §§ 121.025, 121.180(6)(a), 121.150(6), and 121A.050(1) that were based upon the overbroad definitions of "contribution" in Ky. Rev. Stat. Ann. §§ 121.015(6)(e) and 121A.010(11)(a)(5) and/or "permanent committee" in Ky. Rev. Stat. Ann. §§ 121.015(3)(c) and 121A.010(9)(c), and their challenge to Ky. Rev. Stat. Ann. § 121.035(2). (Banks-Baldwin 1995) (as amended, *see* note 2, *supra*). App. 38-43.

[4] These were the Plaintiffs' challenges to Ky. Rev. Stat. Ann. §§ 121A.030(4) and 121.180(6)(b); their challenge to Ky. Rev. Stat. Ann. § 121.190(1) as it pertained to independent expenditures; and their challenges to Ky. Rev. Stat. Ann. §§ 121.025, 121.150(6) and 121A.050(1) that were not based upon either the overbroad definitions of "permanent committee" or "contribution" (*supra*, note 2). (as amended, *see* note 2, *supra*). App. 40-53.

On November 2, 1995, the district court entered its memorandum opinion and order. App. 34, 54. Pursuant to Fed. R. Civ. P. 65(a)(2), the district court consolidated the Plaintiffs' motion for a preliminary injunction with the trial on the merits. App. 54. It found in favor of the Plaintiffs as to their challenge to the five percent tax on PACs in Ky. Rev. Stat. Ann. § 121.180(6)(b) (original language deleted by amendment 1996) and permanently enjoined its application. App. 54. The court rejected the Plaintiffs' remaining challenges, finding that no case or controversy existed with regard to some provisions, while holding that others were constitutional. App. 34-50. It then entered final judgment. App. 55.

After the Plaintiffs filed their initial appellate brief in the circuit court, the State amended the statutory language upon which Plaintiffs based several of their claims (the court of appeals noted that the statutory changes appeared to be in direct response to the Plaintiffs' lawsuit). App. 11. As a result, the circuit court held that these claims were moot.[5] App. 18. Instead of vacating the district court's decision as to these claims, the circuit court affirmed it. App. 33.

The State, however, did not amend Ky. Rev. Stat. Ann. § 121.150(10) (Michie Supp. 1996).[6] The circuit court rejected the Plaintiffs' challenge to this provision on the merits, relying in large part upon a plurality portion of *California Medical Ass'n v. Federal Election Commission*, 435 U.S. 182, 196 (1981) (plurality opinion of Marshall, J.) (*CMA*). The court of appeals held that the $1,500 limit on aggregate contributions to PACs was constitutional because it "prevent[ed] evasion of the $1,000 limit upon direct individual contributions to candidates." App. 27. It also held that the $1,500 limit in Ky. Rev.

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[5] *See* note 3, *supra*.

[6] The Plaintiffs' other claims that were unaffected by the statutory amendments were their challenge to Ky. Rev. Stat. Ann. § 121A.030(4); their challenge to Ky. Rev. Stat. Ann. § 121.190(1) as it pertained to independent expenditures; and their challenges to Ky. Rev. Stat. Ann. §§ 121.025, 121.150(6) and 121A.050(1) that were not based upon either the overbroad definitions of "permanent committee" or "contribution." (Michie Supp. 1996). App. 18-33.

Stat. Ann. § 121.150(10) "does not amount to a difference in kind from the $25,000 limit upheld in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976),] in the context of federal elections." App. 28. Finally, the circuit court – this time relying upon that portion of *CMA* that was decided 5-4 – rejected the Plaintiffs' disparate treatment argument: it held that Ky. Rev. Stat. Ann. § 121.150(10) could treat PACs differently than candidates in terms of aggregate contributions because of the different structures and purposes of PACs, whatever (the court did not say) those might be. App. 29.

The Plaintiffs timely filed a petition for rehearing. In it, they asked the circuit court, *inter alia*, to vacate those portions of the district court's decision that the State had unilaterally prevented the circuit court from reviewing by amending challenged statutory language during the appeal. After the circuit court denied this petition, App. 56, the Plaintiffs timely petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. This Case Involves Questions Of Great Public Importance: Can, And To What Extent May, PACs Be Treated Differently From Candidates And Political Parties In Participating In The Political Process, And Is The State Required To Demonstrate The Need For The Differential Treatment.

Kentucky treats PACs differently from the way it treats candidates and political parties. Kentucky Rev. Stat. Ann. § 121.150(10) prohibits individuals, such as Petitioner Zoeller, from contributing more than $1,500 to all PACs. Because Mr. Zoeller had already contributed a total of $1,500 to other PACs, Kentucky prohibited him (and everyone else who had contributed $1,500 to other PACs) from contributing *any* money to Petitioner KRLPAC; it has thus completely prevented KRLPAC from receiving any funds from Mr. Zoeller (or from anyone else who has reached this level). Moreover, in its zeal to "deal with" PACs, Kentucky prohibited such contributions without any evidence or legislative findings that curtailing, and even eliminating, the exercise of the Petitioners' rights (and

the rights of others) was necessary. Kentucky, though, does not similarly limit contributions to candidates or to political parties. As a result, Mr. Zoeller (and everyone else) may contribute to as many candidates and political parties as he chooses, and candidates and political parties are not similarly deprived of funds from Mr. Zoeller (or from others).

Kentucky's singling-out of PACs for adverse treatment is not surprising given the misguided view of some that there is "too much money in politics,"[7] and that, more specifically, there is too much money from certain (supposedly nefarious) groups, chief among them being PACs.[8] While the connection between PACs and current campaign scandals is tenuous at best, and more likely non-existent, this has not stopped political pundits[9] and professors[10] alike from decrying the involvement of these groups in the political process. As a result, the popular press and academic publications are filled with proposals to curtail dramatically -- and preferably (according to

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[7] Mann & Ornstein, *Credibility for a Collapsed System,* The Washington Post, Dec. 16, 1996, at A25 ("The need for campaign finance reform, both to fix the problems that exploded this year and to deal with the long-term difficulties of the system, is urgent. . . . [Authors assert that the holdings in *Buckley v. Valeo* and its progeny] have enhanced the role of big money in the political process.").

[8] Carney, *Taking On the Fat Cats,* National Journal, Jan. 18, 1997, at 110.

[9] *Id.* at 111, 113-114 (reciting the views of various "reformers").

[10] *See, e.g.,* Blasi, *Free Speech And The Widening Gyre Of Fund Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All,* 94 Colum. L. Rev. 1281, 1293 (1994) (challengers are deterred from running against incumbents due to the formidable war chests that incumbents are able to accumulate from PACs); Raskin & Bonifaz, *The Constitutional Imperative And Practical Superiority Of Democratically Financed Elections,* 94 Colum. L. Rev. 1160, 1176 (1994) (because PACs give money to incumbents, they reduce the openness of the political process to less affluent challengers); *id.* at 1180-181 (all social classes are not equally represented in the electoral process because PACs play a disproportionately important role in it, and their wealthy donors do not "speak" for everyone).

them) completely eliminate – PAC participation in our democracy.

"While not all reformers have the same agenda of problems in mind in the same order of priority," Professor Sorauf notes that "one can fairly describe a consensus agenda for mainstream reform." Sorauf, *Politics, Experience, And The First Amendment: The Case Of American Campaign Finance Reform*, 94 Colum. L. Rev. 1348, 1357 (1994). At the top of this agenda is an almost jihad-like quest to curtail the political participation of PACs. The reformers want "a reduction of 'interested' money (i.e., money of interest groups or their PAC offsprings) reaching candidates in order to reduce the influence of those interests on legislation." *Id.* Indeed, they are almost universal in their desire to get PACs: "Th[e] order of priorities, moreover, is fairly inflexible. Few reformers would find new legislation satisfactory if it did not mount an attack on PACs (i.e., the top priority) . . . . " *Id.*

Two common proposals for eviscerating PAC involvement have appeared in this case: some form of tax on (or "registration fee" for) PACs and a limit on aggregate PAC contributions to candidates. *Id.* at 1362-1363.[11] Professor Blasi notes that a rationale for the latter "reform" is that it would allegedly free-up the time incumbents devote to raising money:

> A different kind of reform would discourage or abolish one source of fund-raising the pursuit of which currently consumes a large chunk of the time of most candidates. P[AC]s could be prohibited from making campaign contributions . . . or candidates could be prohibited from receiving more than a specified amount in total contributions from PACs. . . . If candidates were protected from having to court

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[11] The district court permanently enjoined Kentucky's 5% tax on PAC contributions and independent expenditures, Ky. Rev. Stat. Ann. § 121.180(6)(b) (original language deleted by amendment 1996). App. 54. Although they challenged it below, the Plaintiffs declined to petition this Court for a writ of certiorari to review the constitutionality on Kentucky's 25% limit on aggregate PAC contributions to candidates, Ky. Rev. Stat. Ann. § 121A.030(4). (Michie Supp. 1996). App. 29.

> numerous PACs in order to stay competitive, perhaps the overall time they devoted to fund-raising would drop significantly.

Blasi, supra note 10, at 1319. While Professor Blasi doubts both the efficacy and wisdom of such an approach, *id.* at 1319-1320, such proposals are commonplace. *See* Sorauf, *supra.*

Kentucky's limitation – and in this case, prohibition – on contributions to PACs is thus a manifestation of a national movement to restrict PACs' associational and speech rights. The questions for this Court, then, are: 1) may the government dramatically curtail, or as some advocate, utterly eviscerate, the rights of PACs to participate in our electoral process; and 2) if so, may it do so without first demonstrating that restricting or eliminating their rights serves a compelling interest, that the restriction advances this interest, and that it has employed only narrowly tailored means to advance it. Federal circuit courts and, most importantly, this Court, have appeared to answer these queries negatively. The Sixth Circuit, though, disagrees. This Court should hear this case to determine whether Kentucky's actions are constitutional.

II. The Sixth Circuit Has Failed To Follow Precedent In Holding That PACs May Be Treated Differently From Candidates And Political Parties Without Any Evidence Or Legislative Findings Supporting This Differential Treatment And In Failing To Vacate The Decision Of The District Court.

The Sixth Circuit gave short shrift to (and in fact did not even mention) this Court's pronouncements of the importance of freely associating in the political process. Nor did it recognize that this Court has held in an analogous context that in view of the only compelling interest for restricting political spending – preventing the *quid pro quo* corruption that may result from large individual contributions to candidates (*Buckley, infra*) – PACs are not so inherently corrupting that their right to participate politically via this medium may be targeted for adverse treatment. It also ignored this Court's warnings that when the government restricts First Amendment rights, it may not merely theorize about possible harms and how a restriction

will (theoretically) address them; rather, it must actually establish that the restriction satisfies strict scrutiny. Finally, the Sixth Circuit disregarded this Court's directions for how to dispose of claims that have been rendered moot during appeal through the unilateral acts of the party that prevailed below.

A. The Sixth Circuit Did Not Afford PACs And Individuals The Proper Protection For Their Freedom To Speak And Associate.

In *Buckley*, this Court recognized that the ability to spend money in the political process directly affects our system of governance.

> A restriction on the amount of money a person or group can spend on political communications during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19. As a result, limits on political contributions "operate in an area of the most fundamental First Amendment activities," *id.* at 14: our endeavors to govern ourselves.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)).

Because the ability to spend money is critical to our capability to debate issues and candidates, it implicates the freedom of speech. *Id.* at 14-15. It is no wonder, then, that this "Court observed in *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971), 'it can hardly be doubted that the [right to freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " *Id.* at 15.

"The First Amendment," of course, "protects political association as well as political expression," the reason being that " 'effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' " *Buckley,* 424 U.S. at 15 (quoting *NAACP v. Alabama,* 357 U.S. 449, 460 (1958)). Contribution limits restrict not only the ability to speak about political beliefs, but also the ability to " 'associate with others for the[ir] common advancement. . . . ' " *Id.* (quoting *Kusper v. Pontikes,* 414 U.S. 51, 56 (1973)).

> Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or with groups, such as PACs]. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. . . . [Limits on] contribution[s] [to candidates] thus limit one important means of association with a candidate or committee [even though] they leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates.

Id. at 22. Indeed, this Court has stated that "the primary First Amendment problem raised by . . . contribution limitations is their restriction of one aspect of the contributor's freedom of political association." *Id.* at 24. "In view," then, "of the fundamental nature of [this] right . . . governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' " *Id.* at 25 (quoting *NAACP v. Alabama,* 357 U.S. at 460-461).

This Court has thus strictly reviewed laws that burden the ability of groups to participate in the political process by spending money. For example, in *Citizens Against Rent Control v. City Of Berkeley,* 454 U.S. 290 (1981), an ordinance banned contributions above $250 to committees that were formed to support or oppose ballot measures; this Court held that the ban infringed upon the right of association, as well as individual and collective rights of expression. It initially noted that "to place a Spartan limit – or indeed any limit – on individuals wishing to band together to advance their views on a ballot

measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *Id.* at 296. It then noted that the ordinance did "not seek to mute the voice of one individual, and it cannot be allowed to hobble the collective expressions of a group." *Id.*

Rather than simply defer to the city, this Court "subject[ed] [the ordinance] to exacting judicial scrutiny" because contributions to committees "is beyond question a very significant form of political expression." *Id.* at 298. In doing so, it recounted that "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment": "[that] exception relates to the perception of undue influence of large contributors to a *candidate*." *Id.* at 296-297 (emphasis in original). It rejected the city's assertion that the ordinance was needed as a prophylactic measure "to make known the identity of supporters and opponents of ballot measures"; the city *already* required contributors to committees to make their identities known. *Id.* at 298. This Court thus implicitly found that the ordinance was not narrowly tailored to achieve this end, assuming this end was compelling.

In this case, the Sixth Circuit failed to afford the rights of KRLPAC and Robert Zoeller to freely speak and to associate in the political process the high degree of protection to which they are entitled. It is not simply that the court did not even pay lip service to the importance of the ability to exercise these rights (which it did not). More importantly, it did not strictly scrutinize Ky. Rev. Stat. Ann. § 121.150(10) for preventing Mr. Zoeller from speaking and for preventing him and KRLPAC from associating. Instead of analyzing whether (all) contributions to PACs pose a threat of *quid pro quo* corruption to candidates, or whether the statute was really needed as a prophylactic measure (or at least was narrowly tailored as such), it simply deferred to the State. Further, it simply analogized this case to *CMA* without analyzing whether *CMA* even applied. In sum, the Sixth Circuit erred in failing to rigorously analyze Ky. Rev. Stat. Ann. § 121.150(10) and the State's arguments in support of it. By doing so, it is apparent that both the Sixth Circuit and the State of Kentucky have failed to follow the precedents of this Court.

B. Under *NCPAC* And *Buckley*, The Sixth Circuit Erred In Implicitly Concluding That PACs Are So Inherently Corrupting That They May Be Treated Differently From Candidates And Political Parties.

The Sixth Circuit stated that Mr. Zoeller's would-be contributions to KRLPAC need not be fully protected: they were not speech or association, but rather were "speech [and association] by proxy." App. 26-27. It then upheld the $1,500 aggregate contribution limit to PACs in Ky. Rev. Stat. Ann. § 121.150(10), which prevented Mr. Zoeller from making any contribution to KRLPAC, on the ground that it "prevent[ed] evasion of the $1,000 limit upon direct individual contributions to candidates." App. 27.

Implicit in its reasoning is the notion that Kentucky could treat KRLPAC differently from candidates and political parties because it (like all PACs) is more likely to corrupt candidates by serving as a conduit for Mr. Zoeller's (potentially earmarked) contributions than other groups with which Mr. Zoeller and candidates might have closer ties, e.g., political parties. Indeed, the Sixth Circuit said as much: Kentucky could treat KRLPAC (and all PACs) differently because of its different structures and purposes, whatever (the court did not say) those might be, and whatever (the court did not say) their relevance might be. App. 28-29. Because it did not specify *why* the structure of KRLPAC was so unique that the State could rather uniquely discriminate against it, it appears that the court thought that KRLPAC (like all PACs) was, in essence, *inherently* corrupting.

The Sixth Circuit's rather cursory analysis fails to follow precedent. Mr. Zoeller's contributions to KRLPAC are more properly viewed as fully protected speech and association, not lesser-protected "speech (or association) by proxy." Further, KRLPAC is not so corrupting that there is a compelling interest (prophylactic or otherwise) that warrants treating Mr. Zoeller's contributions to it differently from his contributions to political parties or to candidates. Finally, to the extent there is a compelling prophylactic interest that warrants this different treatment, Kentucky already has *other* means in place that are more narrowly tailored to advance it, and if these means, by themselves, are somehow insufficient, the means it is using in Ky. Rev. Stat. Ann. § 121.150(10) are a blunderbuss, not a scalpel.

1. *NCPAC* Held That PACs Are Not Inherently Corrupting, And It Reiterated *Buckley's* Holding That The Only Compelling Interest That Supports Contribution Limits Is The Possibility Of *Quid Pro Quo* Corruption Between A Contributor And A Candidate, Thereby Casting Doubt On The "Speech By Proxy" And "Prophylactic" Rationales Of *CMA*.

In *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (NCPAC), this Court reviewed a part of the Federal Election Campaign Act (FECA) that prohibited PACs from making independent expenditures above $1,000. The Court rejected the state's argument that the speech rights of NCPAC and another PAC were not entitled to full First Amendment protection (i.e., that they could be treated differently) simply because they were PACs. *Id.* at 494. Moreover, the fact that the statute infringed upon *group* rights meant that these PACs' rights of political association were also in jeopardy.

> We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to amplify the voice of their adherents.

Id. (internal quotations omitted). As a result, the Court strictly scrutinized the statute. *Id.* at 496.[12]

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[12] It could be argued that the Court accorded NCPAC's speech and associational rights full First Amendment protection because independent expenditures were involved, rather than direct contributions; hence, the Court was not dealing with "speech by proxy," as the *CMA* plurality termed contributions. *Id.* at 494-495. However, as will be shown, in *NCPAC*, this Court questioned the "speech by proxy" rationale generally, not just as it applied to independent expenditures. Further, as will be shown in Part B.2., *infra*, *CMA* is distinguishable from both *NCPAC* and this case and should

In reaching its conclusion, this Court rejected the government's argument that contribution limits to PACs should be afforded lesser scrutiny because "speech by proxy," rather than speech, was involved. In doing so, this Court revealed the flaws in the "speech by proxy" rationale upon which the *CMA* plurality based its decision.

> Another reason the "proxy speech" approach is not useful in this case is that the contributors [to the PACs] obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not want to part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Id. at 495.

Next, in strictly reviewing the statute, this Court noted that it had "held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Id.* at 496-497. It then recognized that PACs are not corrupting simply because they are *groups of individuals*; in other words, the structure of PACs does not, *ipso facto,* make them corrupting. *Id.* at 497. The Court held that the fact that PACs might be able to make *greater* independent expenditures due to the collective efforts of their members did not alter the calculus: because independent expenditures were made without the knowledge of candidates, there was no danger of a *quid pro quo* between a PAC and an (unknowing) candidate, regardless of the amount of the expenditure. *Id.* at 497-498. Because there was no danger of corruption, the statute did not advance any compelling interest; as a result, it was unconstitutional.

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not be followed. To the extent this plurality opinion is implicated here, *CMA* was wrongly decided and should be overruled.

In invalidating the statute, the Court also undermined the second basis for the plurality opinion in *CMA*: that contributions to PACs justify various restrictions as "prophylactic" measures. Besides the fact that independent expenditures were involved in *NCPAC* rather than direct contributions, this Court observed that the danger of *quid pro quo* corruption was not present in *NCPAC* also because the contributions to the PACs – whereby they received the funds to make their expenditures – were small, and they were to PACs, not to candidates: "The amounts given to the PACs are overwhelmingly small contributions, well under the $1,000 limit on contributions upheld in *Buckley*; and the contributions are by definition not coordinated with the campaign of the candidate." *Id.* at 497. As a result, they "do not raise the same concerns as the sizeable contributions involved in *California Medical Assn,*" *id.* at 495, for which the plurality there said "prophylactic" protection was needed.

As in *Berkeley* – and unlike the Sixth Circuit here – this Court in *NCPAC* did not simply defer to a legislative determination that a "prophylactic measure" was needed for PAC contributions. *Id.* at 500. It noted that PACs were, for example, unlike for-profit corporations and labor unions, whose possibly corrupting involvement in the electoral process had long been acknowledged. *Id.; see Federal Election Commission v. National Right To Work Committee,* 459 U.S. 197, 210 (1982). PACs were "designed expressly to participate in political debate [and] . . . are [thus] quite different from the traditional corporations organized for economic gain." *NCPAC,* 470 U.S. at 500. Because of this difference, and the government's failure to produce any evidence linking PAC expenditures to corruption, this Court rejected the government's (unsubstantiated) assertion that restricting PAC expenditures was needed as a "prophylactic measure." *Id.* at 501. In doing so, it stated that "[w]e are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *Id.*

Under *NCPAC,* then, the Sixth Circuit erred in concluding that Kentucky could restrict Mr. Zoeller's speech in the political process and could restrict the political association of Mr Zoeller and KRLPAC because his (would-be) contribution to KRLPAC is afforded less protection as "speech (or association) by proxy."

Under *NCPAC,* it also erred in holding that KRLPAC is organized so dangerously that Kentucky possesses a compelling interest in restricting "wholesale . . . clearly protected conduct" by preventing Mr. Zoeller from making *any* contributions, not merely large ones, to it. Quite simply, KRLPAC's structure does not implicate the only compelling interest for which this Court has upheld restricting electoral spending – eliminating the possibility of *quid pro quo* corruption due to large, individual contributions to candidates – notwithstanding the contrary views of the *CMA* plurality.

2. *CMA* Does Not Resolve The Constitutionality Of Ky. Rev. Stat. Ann. § 121.150(10), And *NCPAC* And Subsequent Opinions Have Cast Doubt On The Viability Of This Opinion.

As noted, the Sixth Circuit relied almost exclusively on *CMA* – particularly the plurality opinion – in fashioning its decision. App. 26-29. However, this opinion does not resolve the constitutionality of Ky. Rev. Stat. Ann. § 121.150(10). As will be shown, the plurality opinion of *CMA* is distinguishable from this case and is unsound; as a result, this Court should decline to follow it, if not overrule it. As will also be shown, the equal protection portion of *CMA* also is distinguishable, is analytically problematic, and is not dispositive of the Petitioners' challenge based upon the deprivation of their associational rights.

a. That Portion Of *CMA* Concerning "Speech by Proxy" And An Alleged "Prophylactic Interest" In Limiting Contributions To PACs Is Not Dispositive And Is Distinguishable.

The plurality opinion of *CMA* upheld a limit on contributions to a single PAC. 453 U.S. at 193-200. It did not concern an aggregate limit on contributions to PACs, nor did it address the precise situation before this Court: whether it is constitutional for such a limit to prohibit a person, in this case, Mr. Zoeller, from making *any* contributions – not just large contributions – to a PAC, in this case, KRLPAC. Because the only compelling interest for restricting contributions, *NCPAC, supra,* is preventing the *quid pro quo* corruption that may result from *large*, individual contributions

to candidates, the plurality opinion of *CMA* is inapposite to a case such as this, where the government has limited aggregate contributions to PACs, thereby prohibiting Mr. Zoeller from making *any* contributions *to KRLPAC*. This Court, quoting *CMA* in *NCPAC*, tacitly recognized the problem with such a prohibition:

> The plurality [in *CMA*] emphasized in that case, however, that nothing in the statutory provision in question "limits the amount an unincorporated association or any of its members may independently expend in order to advocate political views," *but only the amount* it may contribute to a multicandidate [PAC].

NCPAC, 470 U.S. at 494-495 (emphasis added) (quoting *CMA*, 453 U.S. at 195). The provision in *CMA* is much different from the provision in this case, since Ky. Rev. Stat. Ann. § 121.150(10) is an aggregate limit on what an individual may contribute to all PACs, not a limit on what an individual may give to each PAC. As a result, Ky. Rev. Stat. Ann. § 121.150(10) is much more harmful than the statute the *CMA* plurality analyzed, and the Sixth Circuit should not have relied upon *CMA* in its opinion.

Furthermore, and as noted, this Court tacitly recognized in *NCPAC, supra*, that the "speech (and association) by proxy" and the "prophylactic measures" rationales, upon which the *CMA* plurality based its decision, are problematic. The "speech (and association) by proxy" rationale is troublesome because persons, such as Mr. Zoeller, contribute to PACs, such as KRLPAC, because they "obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not want to part with their money." *NCPAC*, 470 U.S. at 495. "To" thus "say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Id.* In short, PACs' "form of organization or method of solicitation [does not] diminish[ ] their entitlement to First Amendment protection." *Id.* at 494.

The "prophylactic measures" rationale is troublesome because the vast majority of contributions to PACs are made without the knowledge or consent of candidates; as a result, there is no danger

of a *quid pro quo* between a contributor to a PAC and a candidate who eventually receives a contribution from the PAC. *Cf. id.* at 497-498. Even if there were such a danger due to the structure of PACs, it would not justify barring Mr. Zoeller, for example, from making *any* contributions to KRLPAC. *See id.* at 497 ("The amounts given to the PACs are overwhelmingly small contributions, well under the $1,000 limit on contributions upheld in *Buckley*; and the contributions are by definition not coordinated with the campaign of the candidate."); *id.* at 495 (Thus, they "do not raise the same concerns as the sizeable contributions involved in *C[MA].*"). As this Court similarly noted in *NCPAC*:

> [e]ven were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, [the statute] is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal [and small] discussion groups that solicit neighborhood contributions . . . .

470 U.S. at 498.

Moreover, PACs are not corrupting simply because they are *groups of individuals;* their structure does not, *ipso facto,* make them uniquely corrupting. *Id.* at 497. Indeed, this Court has noted that PACs are *not* like for-profit corporations and labor unions for which prophylactic measures might be needed. *Id.* at 500. PACs were "designed expressly to participate in political debate [and] . . . are [thus] quite different from the traditional corporations organized for economic gain." *Id.* Because of this difference, it is unnecessary for Kentucky to restrict "wholesale" the rights of Mr. Zoeller and KRLPAC. *See id.* at 501.

This Court is not obligated by *stare decisis* to follow the plurality opinion from *CMA*. *Schlup v. Delo,* 115 S. Ct. 851, 877 (1995) (Scalia, J., dissenting) (plurality opinion is not binding precedent). Because its rationales are highly problematic and allow the government to impinge substantially upon First Amendment rights, it should not be followed.

b. That Portion Of *CMA* Addressing The Differential Treatment Of Groups Is Distinguishable, Is Analytically Problematic, And Is Not Dispositive Of The Associational Rights Problem In This Case.

The equal protection part of *CMA* upheld treating unincorporated associations differently from for-profit corporations and labor unions. More specifically, it held that a state could limit unincorporated associations' contributions to their PACs while not limiting at all the amounts that for-profit corporations and labor unions spend to pay the administrative costs of their connected PACs. 453 U.S. at 200-201. Unlike this case, *CMA* did not concern a statute that limited aggregate contributions to PACs but did not similarly limit contributions to candidates or to political parties. Nor did it address the specific situation before this Court: whether Kentucky may prohibit Mr. Zoeller from making *any* contributions to KRLPAC while allowing him to contribute to as many candidates and political parties as he likes. In addition to its facts, this portion of *CMA* is analytically distinguishable from this case for two reasons.

First, this Court justified the different treatment on the exercise of the unincorporated association's rights by looking at the FECA as a whole; because it reasoned that the FECA, as a whole, imposed far fewer restrictions on unincorporated associations than it did on for-profit corporations and labor unions, it concluded that there was no disparate treatment. *Id.* at 200. This approach yields a different result here. Kentucky's election laws impose *more* restrictions on PACs than, for example, on political parties. *See, e.g.*, Ky. Rev. Stat. Ann. § 121A.030(4) (limiting all PAC contributions to candidates for Governor and Lieutenant Governor to 25% of their total contributions). Thus, the equal protection analysis of this Court in *CMA* is inapposite to the Petitioners' equal protection claims as to Ky. Rev. Stat. Ann. § 121.150(10).

Second, *CMA*'s equal protection analysis is inapposite to the Petitioners' *associational* claims. The Petitioners did not challenge Ky. Rev. Stat. Ann. § 121.150(10)'s different treatment of PACs vis-a-vis candidates and political parties solely for depriving them of the equal protection of the laws. They also challenged the statute for discriminating against the rights of Mr. Zoeller and KRLPAC to

associate with each other: Kentucky allows Mr. Zoeller to contribute to a candidate or a political party but not to KRLPAC. Neither *CMA* nor the opinion of the Sixth Circuit addresses the Petitioners' claims that Kentucky thus discriminates against persons who wish to associate with PAC's rather with candidates, and that it discriminates against certain associations, PACs, but not others, such as political parties. Because there is no compelling interest for this differential treatment of associational rights, *NCPAC*, *supra*, the Sixth Circuit erred in upholding Ky. Rev. Stat. Ann. § 121.150(10).

3. Kentucky Already Has In Place Means That Are More Narrowly Tailored To Advance Any "Prophylactic" Interest In Restricting Contributions To PACs, And In The Event That These Means Are Not Sufficient By Themselves, The Means Ky. Rev. Stat. Ann. § 121.150(10) Currently Employs Are Nevertheless Too Broad.

Assuming, *arguendo*, that KRLPAC's structure is such that contributions *to it* uniquely raise the possibility of *quid pro quo* corruption between a contributor *and a candidate*, the Sixth Circuit did not follow precedent in concluding that Ky. Rev. Stat. Ann. § 121.150(10) was necessary as a "prophylactic measure." If Kentucky is concerned that persons may seek to circumvent (*see* Sixth Circuit opinion, App. 27) its $1,000 contribution limit to candidates (Ky. Rev. Stat. Ann. § 121.150(6) (Michie Supp. 1996)), and assuming that the State has shown that PACs, more so than other groups, e.g., political parties, will more readily serve as evasion vehicles, Kentucky has in place means that will achieve this goal without eviscerating the associational and speech rights of Mr. Zoeller and KRLPAC. Kentucky already forbids both individuals and PACs from circumventing the contributions limits to candidates: Ky. Rev. Stat. Ann. § 121.150(8) prohibits PACs from "earmarking" contributions to evade the $1,000 limit, and Ky. Rev. Stat. Ann. § 121.150(9) similarly prohibits individuals from evading it. (Michie Supp. 1996). App. 59.

As noted, in *Berkeley*, this Court rejected the city's assertion that a $250 contribution limit to committees was needed as a prophylactic measure "to make known the identity of supporters and opponents of ballot measures"; the city *already* required

contributors to committees to make their identities known. 454 U.S. at 298. Under *Berkeley*, then, the Sixth Circuit erred in allowing Kentucky to restrict "wholesale . . . clearly protected conduct," *NCPAC*, 470 U.S. at 501, under the guise of a prophylactic measure, because it already directly prohibits evading the $1,000 contribution limit by earmarking contributions. In short, Ky. Rev. Stat. Ann. § 121.150(10) is not the most narrowly tailored prophylactic measure; Ky. Rev. Stat. Ann. § 121.150(8) and (9) are.[13]

However, even if Ky. Rev. Stat. Ann. § 121.150(8) and (9) were not, by themselves, sufficient as "prophylactic measures," and Ky. Rev. Stat. Ann. § 121.150(10) was needed as an *additional* prophylactic measure, the statute in its present form does not employ narrowly tailored means. As noted, the compelling interest that supports restricting contributions is preventing the *quid pro quo* corruption that may result from large, individual contributions *to candidates*. *Buckley*, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders, the integrity of our system . . . is undermined."). While the Petitioners believe that this interest does not support limiting contributions *to PACs* and that the plurality in *CMA* thus erred, even if this interest supports such limits, *NCPAC* recognized that *CMA* only upheld limiting *large* contributions to PACs. It did not uphold effectively prohibiting *any* contributions to PACs. Given that the compelling interest is predicated upon *large* contributions, Ky. Rev. Stat. Ann. § 121.150(10), is not narrowly tailored. By limiting aggregate contributions to all PACs, which effectively prohibited Mr. Zoeller from making *any*

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[13] *See Colorado Republicans Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309, 2329 (1996) (opinion of Thomas, J., concurring in the judgment and dissenting in part) ("that bribery laws are not completely effective in stamping out corruption is not justification for the conclusion that prophylactic controls on funding activity are narrowly tailored.").

contributions to KRLPAC, the statute unduly encroaches upon legitimate political speech and association. *Id.* at 24-25.[14]

C. Under *National Treasury Employees Union*, The Sixth Circuit Erred In Implicitly Holding That In Regulating First Amendment Rights, The State Need Not Put Forth Any Evidence Or Legislative Findings To Support The Regulation.

To prevent the government from suppressing First Amendment rights without a compelling justification, this Court has required the government to show the existence of the evil it fears, the source from which it emanates, and that the means it has chosen are narrowly tailored to eliminate it. This requirement holds true for even the most seemingly reasonable restrictions on the exercise of First Amendment rights. "As Justice Brandeis reminded us, [even] a reasonable burden on expression requires a justification far stronger than mere speculation about serious harms." *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1017 (1995). The government may not go after a group based upon an unsubstantiated fear that exercising its First Amendment rights will cause (or is) an evil.

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.

Id. (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (concurring opinion)).

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[14] This conclusion is underscored by comparing the statute's $1,500 aggregate contribution limit with the $25,000 aggregate contribution limit that *Buckley* upheld in 1976. *Id.* at 38. The $1,500 aggregate limit is over sixteen and one-half times as severe as the limit upheld in *Buckley*, and it does not account for two decades of inflation. Accounting for inflation, a $1,500 limit on aggregate contributions today is approximately equivalent to a $559.50 limit on such contributions in 1976. *See Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994) (comparing state's contribution limits with those *Buckley* upheld in light of inflation).

More recently, this Court has noted that a statute that "singles out expressive activity for special regulation heightens the Government's burden of justification." *National Treasury Employees Union,* 115 S. Ct. at 1017. In such cases, the state bears a very heavy burden of *proving* that a regulation satisfies strict scrutiny:

> when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, *it must do more than simply posit the existence* of the disease sought to be cured. . . . It must *demonstrate that the harms are real*, not merely conjectural, and that the regulation *will in fact* alleviate these harms in a direct and material way.

Id. (emphasis added) (quoting *Turner Broadcasting System, Inc. v. Federal Communications Commission,* 114 S. Ct. 2445, 2770 (1994) (plurality opinion of Kennedy, J.)).

In *Turner Broadcasting System,* a plurality of this Court found that the government did not meet its burden of actually demonstrating that regulating the exercise of First Amendment rights was needed to remedy a specific harm. 114 S. Ct. at 2470-2472. Even though the government could point to legislative findings and an administrative study indicating that the regulation was necessary, *id.* at 2470 ("[i]n defending the factual necessity [of the regulation,] the Government relies in principal part on Congress' legislative finding . . . . ") *id.* at 2472 ("As support for [the regulation,] the Government relies upon a 1988 FCC study . . . . "), the Court nevertheless found that it had failed to meet its burden. It had failed to prove that the *particular* regulation was needed to remedy a *specific* harm. *Id.* at 2471-2472 ("Without a more substantial elaboration . . . of predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence . . . we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions . . . . ").

In this case, Ky. Rev. Stat. Ann. § 121.150(10) significantly infringes upon – and in the case of Mr. Zoeller and KRLPAC, effectively prohibits the exercise of – the First Amendment rights to speak and to associate. Under the decisions of this Court, then, Kentucky was required to demonstrate, not simply speculate, that PACs are so potentially corrupting that it may treat them differently from other groups (e.g., political parties) and from individuals

(e.g., candidates). It was required to put forth evidence or legislative findings demonstrating that it was necessary to single-out PACs for such adverse treatment. Because the Sixth Circuit *sub silentio* held that Kentucky was not required to do so, it failed to follow precedent. In so doing, it turned a blind eye to Kentucky's witch-hunt of PACs.

D. Under *Arizonans For Official English*, The Sixth Circuit Erred In Holding That Even Though Part Of This Case Became Moot During Appeal Due To The State's Unilateral Acts, It Need Not Vacate The District Court's Decision.

In *Arizonans For Official English v. Arizona*, 117 S. Ct. 1055, 1071 (1997), this Court reiterated that when a case becomes moot during appeal, the appellate court should vacate the decision of the lower court. Doing so will prevent prejudice to the litigants.

> Vacatur clears the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review. Vacatur is in order when mootness occurs through happenstance – circumstances not attributable to the parties – or, relevant here, the unilateral action of the party who prevailed in the lower court.

Id. (internal citations and quotation marks omitted). Vacatur is particularly appropriate when the party who prevailed below unilaterally moots the appeal. *Id.* at 1072.

> [I]t would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment . . . The exceptional circumstances . . . in this case . . . lead us to conclude that vacatur . . . is the equitable solution.

Id. (quoting Brief for Respondents State of Arizona, et al. at 34).

Here, the district court consolidated the Petitioners' motion for a preliminary injunction with a trial on the merits and entered judgment in favor of the State. App. 54-55. Many of the Petitioners' challenges (*see* note 5, *supra*) were mooted by the "unilateral action of the party who prevailed [in the district court],"

Arizonan's For Official English, 117 S. Ct. at 1071, when the State repealed or amended challenged language during the appeal. App. 11-13. The Sixth Circuit should have vacate[d] the judgment below and remand[ed] with a direction to dismiss." *Id.* Such an approach would "clear[ ] the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review." *Id.* However, by affirming the district court's decision, App. 33, the Sixth Circuit has "permit[ted] [the State] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." *Id.* at 1072. Because it allowed the State to do so, the Sixth Circuit failed to follow precedent.

III. The Sixth Circuit's Opinion Conflicts With The Decisions Of Her Sister Circuits In Holding That PACs May Be Treated Differently From Individuals Without Any Evidence Or Legislative Findings Supporting This Differential Treatment, And In Failing To Vacate The Decision Of The Lower Court.

Because the Sixth Circuit failed to follow precedent, its decision conflicts with the opinions of her sister circuits which did. The Petitioners will now discuss these opinions.

A. The Sixth Circuit's Decision Conflicts With *Vote Choice*, Where The First Circuit Held That Preventing The Possibility Of Corruption Did Not Warrant Treating PACs Differently From Individuals.

In *Vote Choice, Inc., v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), the First Circuit struck down Rhode Island's "first dollar disclosure" requirements for PACs for violating the right of association. There, PACs had a "duty to disclose the identity of, and the amount given by, every contributor – no matter how modest the contribution," but candidates did not. *Id.* at 29. The State thus treated persons who chose to exercise their right of association by contributing to PACs differently than it treated "persons who, for one reason or another, preferred not to pool their resources," and instead contributed directly to candidates. *Id.* at 33.

The First Circuit began its opinion by noting that "[t]he first amendment frowns upon laws which burden associational

rights, particularly in the sphere of political speech. The more lopsided the burden, the more probable it is that a constitutional infirmity looms." *Id.* The First Circuit then held that treating PACs differently from candidates did "not cater to any cognizable government interest"; it would not prevent corruption, and there was no evidence that it was needed to prevent evasion of contribution limits to candidates. *Id.* at 35.

> It does not serve the state's interest in combatting corruption because corruption can as easily spring from direct contributions to candidates as from contributions that flow through PACs. And, if the danger that tiny contributions will foment corruption is not great enough to justify significant inroads on first amendment rights [directly], it is certainly not great enough to justify disparate treatment of PACs. Similarly, the unevenness does not serve the state's interest in enforcing its contribution limits; after all, the district court found no evidence that PAC contributors might try to subvert the $1,000 cap by an endless stream of $1 donations.

Id.

Finally, the First Circuit summarized the statute's "three grave weaknesses":

> First, . . . it burdens the rights of individuals to band together for the purpose of making either independent election expenditures or direct political contributions. Second, by imposing this burden on PACs and PAC contributors while regulating candidates and certain of their financial backers (*viz.*, individuals who contribute directly to candidates rather than to PACs) more loosely, the statute compounds the unfairness of this burden. Finally, the disparity between the two disclosure thresholds (one for PACs and the other for individuals), and, hence, the net burden imposed solely on associational rights, bears no substantial relation to the attainment of any important state interest. Their cumulative effect compels the conclusion that the statute abridges the first amendment.

Id.

In this case, Ky. Rev. Stat. Ann. § 121.150(10) suffers from the same "three grave weaknesses" as the statute the First Circuit invalidated. First, by limiting aggregate contributions to PACs, it "burdens the rights of individuals to band together." Second, "by imposing this burden on PACs and PAC contributors while regulating candidates and certain of their financial backers (*viz.*, individuals who contribute directly to candidates rather than to PACs) more loosely, the statute compounds the unfairness of this burden." "Finally," and as demonstrated in Part II.B., *supra*, "the disparity between the two [aggregate contributions limits] ([a $1,500 limit] for PACs and [no such limit] for individual [candidate]s), and, hence, the net burden imposed solely on associational rights, bears no substantial relation to the attainment of any important state interest." Because the Sixth Circuit, unlike the First Circuit, did not conclude that the "cumulative effect [of these weaknesses] compels the conclusion that the statute abridges the first amendment," its decision conflicts with *Vote Choice*.

B. The Decision Of The Sixth Circuit Conflicts With That Of The Eighth Circuit In *Carver v. Nixon*, Where The Court Held That A State Must Put Forth Evidence Or Legislative Findings To Support Its Regulation Of Speech And Association.

In *Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir. 1995), the Eighth Circuit held that Missouri "ha[d] failed to carry its burden of demonstrating that [its contribution limits] will [prevent *quid pro quo* corruption] in a direct and material way or is closely drawn to avoid unnecessary abridgement of associational freedoms." (internal citation omitted). It found that while Missouri had produced some evidence of the need for contribution limits generally, it had not produced any evidence that *its* contribution limits were not so low that in preventing a few large contributions that might corrupt a candidate, they prevented many more lower contributions that would not, i.e., that they were narrowly tailored. *Id.* at 638-642.

> The State produced no evidence as to why the Proposition A limits of $100, $200, and $300 were selected. Further, the State presented no evidence to

> demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions. The record is barren of any evidence of harm or disease that needed to be addressed between the limits of Senate Bill 650 and those enacted in Proposition A.

Id. at 643. Because Missouri "made no showing as to why" it needed so severely to "restrict the First Amendment rights of so many contributors in order to prevent corruption or the appearance of corruption associated with large campaign contributions," the Court held "that [its] limits unconstitutionally burden . . . rights of association and expression." *Id.* at 644.

The Sixth Circuit, on the other hand, has allowed Kentucky to prevent Petitioners Zoeller and KRLPAC from associating without any evidence or legislative findings that doing so is necessary. As a result, its decision conflicts with *Carver.*

C. The Sixth Circuit's Decision Conflicts With Those Of Several Circuits, Which Hold That When The Party Who Prevailed Below Unilaterally Moots An Appeal, The Appellate Court Should Vacate The Lower Court's Decision.

The Sixth Circuit's refusal to vacate the district court's judgment conflicts with the decisions of several circuits, which have recognized that it is inequitable to force parties "to acquiesce in [adverse lower court judgments]" when they were deprived, "through no fault of their own . . . of a review on the merits of th[e] . . . adverse ruling." *In Re Orthopedic Bone Screw Products Liability Litigation,* 94 F.3d 110, 111 (3rd Cir. 1996). It is particularly inappropriate to do so when the party that prevailed below unilaterally deprived the losing party of its day in (appellate) court by mooting the appeal. *Associated General Contractors Of Connecticut, Inc., v. City Of New Haven,* 41 F.3d 62, 67 (2nd Cir. 1994). In such cases, these circuits have vacated the decisions from which the losing party appealed. *Id.*; *see also In Re Orthopedic Bone Screw Products Liability Litigation, supra; Public Utilities Commission v. Federal Energy Regulatory Commission,* 100 F.3d 1452, 1461 (9th Cir. 1996). As noted, the Sixth Circuit did not do so here.

CONCLUSION

In *City Of Berkeley,* this Court began its analysis of the ordinance at issue by noting the unbroken tradition of citizens' groups vigorously participating in our democracy:

> the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. [Since then,] [t]he tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

454 U.S. at 294. This important tradition is in jeopardy, for Kentucky has prescribed shutting down PAC participation as a panacea that will cure our electoral process of the diseases from which it currently suffers. Because there are no data to support its diagnosis, its prescription is more likely a placebo, if not a poison. The Sixth Circuit thus erred in filling this prescription.

Wherefore, the Petitioners respectfully pray that the Court grant the *Petition for a Writ of Certiorari* to ensure that government does not sweep this form of association from our political landscape without any evidence to justify its doing so.

Respectfully submitted,

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Dated: July 7, 1997

APPENDIX

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APPENDIX A

No. 95-6581

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENTUCKY RIGHT TO LIFE, INC.; KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE (KRLPAC); ROBERT ZOELLER; LORA ROBERTSON, Treasurer of Kentucky Right to Life Political Action Committee, *Plaintiffs-Appellants,* *v.* JOSEPH TERRY, et al., *Defendants-Appellees.*	)	ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed March 7, 1997

Before: CONTIE, SUHRHEINRICH, and MOORE, Circuit Judges.

SUHRHEINRICH, Circuit Judge. Numerous Kentucky public officials have been convicted of abusing their political offices for personal gain over the past twenty-five years. To address this serious problem, the Kentucky General Assembly passed the Campaign Finance Law in 1974. *See* Ky. Rev. Stat. Ann. §§ 121.015-121.990 and Ky. Rev. Stat. Ann. §§ 121A.005-121A.990 (Banks-Baldwin 1995) (the

"Act").[1] The Act regulates political contributions and expenditures by groups and individuals in state and local elections and has been amended periodically by the Kentucky legislature.

In the fall of 1995, plaintiffs, a non-profit corporation, a political action committee ("PAC"), and an individual, brought facial constitutional challenges to numerous aspects of the Act. The named defendants were numerous Kentucky officials charged with enforcement of the Act [hereinafter State]. The district court granted summary judgment in favor of the State, and plaintiffs appealed.[2] After plaintiffs filed their brief with this Court, the Kentucky General Assembly amended various portions of the Act relevant to this appeal. Upon review, we hold that several of plaintiffs' challenges have been mooted by these amendments and that the Act survives plaintiffs' remaining constitutional challenges.

I. Background

A. Plaintiffs

Plaintiffs include Kentucky Right to Life ("KRL"), a non-profit corporation organized to protect the unborn and educate the public on abortion, Kentucky Right to Life Political Action Committee ("KRLPAC"), a separate political action committee within KRL, and Robert

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[1] All future references are to Act unless otherwise indicated.

[2] The district court dismissed several claims for failure to state a case or controversy and sustained other challenges to the Act on the merits.

Zoeller. Both KRL and KRLPAC engage in political activity within the state of Kentucky through fundraisers, rallies, issue advocacy, and political contributions for and against candidates for public office. Mr. Zoeller has contributed to KRL and KRLPAC during previous years and wishes to contribute freely to those organizations in the future. Plaintiffs alleged that the Act violated plaintiffs' First Amendment freedoms of speech and association by unconstitutionally restricting their political speech.

B. General Legislative Scheme

A brief introduction to the Act is necessary to understand plaintiffs' challenges. As noted previously, the purpose of the Act is to combat actual and perceived corruption in Kentucky politics by regulating contributions and expenditures in Kentucky public elections. The Act creates numerous specific limitations upon political activity by defining certain groups and activities in a definitional section and then regulating those groups and activities through other sections. For example, the Act defines "permanent committee" and "contribution" in the definitional section and then utilizes those defined terms in its regulatory sections. Interpreting the Act's defined terms, therefore, is critical in determining the scope and effect of the Act. The Registry of Election Finance, the state agency charged with enforcing the Act, routinely interprets this definitional section in determining its enforcement procedure.

Once a particular group or activity falls within a regulated category by virtue of the definitional section of the Act, the degree of regulation varies depending on: 1)

the nature of the expenditure; and 2) the nature of the organization making that expenditure. The Registry has historically recognized three types of expenditures: 1) direct contributions; 2) independent expenditures; and 3) issue advocacy expenditures.[3] The Registry has also distinguished between corporations, PACs, and individuals. As to expenditures, direct contributions are regulated most heavily; issue advocacy expenditures receive only minimal scrutiny. As to regulated entities, large organizations are more strictly regulated than individual contributors, with corporations and political action committees, which typically possess extensive resources to influence elections, the most heavily regulated. In sum, the Act combats corruption by placing greater restrictions upon direct corporate and PAC contributions to political candidates, and lesser restrictions upon individual contributions and issue advocacy expenditures. Keeping this general scheme of broad regulation in mind, we now turn

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[3] Direct contributions include those expenditures contributed directly to a political candidate or affiliated political action committee ("PAC") for the purpose of influencing an election. Independent expenditures include individually-sponsored advertisements expressly advocating the defeat or election of a clearly identified candidate. Independent expenditures differ from direct contributions in that the endorsed candidate or her PAC has no direct financial involvement with the independent expenditure. In effect, the expenditure is disbursed "independently" of the candidate which it supports. Finally, issue advocacy expenditures include those expenditures made for or against issues of public importance, rather than for the defeat or election of a clearly identified candidate. Proposed constitutional amendments and statewide ballot issues typically fall into this category.

to plaintiffs' specific challenges to the Act presented before the district court.

C. District Court Proceedings

In the district court, plaintiffs presented various challenges to: 1) the Registry's interpretation of the definitional section of the Act; and 2) specific provisions of the Act.

Regarding the Act's definitional section, plaintiffs argued that the defined terms "contribution" and "permanent committee" were broad enough to encompass plaintiffs' activities, subjecting them to unconstitutional regulation under the Act.[4] Plaintiffs asserted a broad

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[4] Section 121.015(6)(e) defined contribution in relevant part as any:

> [e]xpenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purposes of influencing an election.

Ky. Rev. Stat. Ann. § 121.015(6)(e) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.015(6)(e) (Banks-Baldwin 1996 Acts Issue).

Section 121.015(3)(c) defined permanent committee, in relevant part, as:

> a group of individuals, including an association, committee, or organization, other than a campaign committee, political issues committee, inaugural committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose political activity which may include support of or opposition to selected candidates, slates of candidates, political

definition of "contribution" to include direct contributions as well as independent expenditures and issue advocacy expenses. Relying upon this broad definition, plaintiffs alleged that § 121.025 violated the Free Speech Clause by prohibiting plaintiffs from engaging in issue advocacy or making independent expenditures in connection with political candidates.[5] Plaintiffs further asserted a broad definition of "permanent committee" to include organizations which advocate the election or defeat of clearly identified candidates as well as organizations which primarily address issues of public importance. Relying upon this broad definition, plaintiffs claimed that § 121.180(6)(a), which required all permanent committees to file financial reports with the Registry of Election Finance, violated the Free Speech Clause because it applied to organizations, like plaintiffs, which engage primarily in issue advocacy rather than direct candidate support.[6]

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parties, or issues of public importance, and which functions on a regular basis throughout the year.

Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-Baldwin 1996 Acts Issue).

[5] Section 121.025 prohibited corporations from:

contribut[ing], either directly or indirectly, any money, service or other thing of value towards the nomination or election of any . . . officer . . . in this state.

Ky. Rev. Stat. Ann. § 121.025 (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.025 (Banks-Baldwin 1996 Acts Issue).

[6] Section 121.180(6)(a) provided in relevant part:

[e]ach permanent committee . . . shall make a full report, upon a prescribed form, to the registry of all

Plaintiffs also presented direct constitutional challenges to six regulatory provisions of the Act. First, plaintiffs alleged that § 121.025, which prohibited corporations from making direct contributions to political candidates, violated the Free Speech Clause because it applied to nonprofit corporations which do not pose a significant threat of corruption to the political process.[7] Second, plaintiffs alleged that § 121.035(2), which prohibited corporate employees from handling funds earmarked for independent expenditure or issue advocacy, violated the Free Speech Clause by precluding plaintiffs from engaging in issue advocacy or making independent expenditures in connection with political elections.[8] Third, plaintiffs alleged that § 121.190(1), which required identification of the sponsor on each paid political advertisement, violated plaintiffs' First Amendment right to

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> money, loans, or other things of value, received by it from any source, and all expenditures authorized, incurred, or made, since the date of the last report.

Ky. Rev. Stat. Ann. § 121.180(6)(a) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.180(6)(a) (Banks-Baldwin 1996 Acts Issue).

[7] *See supra* note 5.

[8] Section 121.035(2) provided in relevant part:

> No officer, agent, attorney, or employee of any corporation . . . shall disburse, distribute, pay out, or in any way handle any money [or] funds . . . to be used or employed in any way for the purpose of aiding, assisting, or advancing any candidate for public office.

Ky. Rev. Stat. Ann. § 121.035(2) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.035(2) (Banks-Baldwin 1996 Acts Issue).

anonymously publish their political views.[9] Fourth, plaintiffs alleged that §§ 121.150(6) and 121A.050(1), which limited to $500 the amount any individual or permanent committee could contribute to any one political candidate in any one election year, violated the Freedom of Association Clause by limiting plaintiffs' ability to fully ally themselves with candidates of their choice.[10]

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[9] Section 121.190(1) provided in relevant part:

> All newspaper or magazine advertising posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements with reference to or intended for, the support or defeat of a candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words "paid for by" followed by the name and address of the payer.

Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1996 Acts Issue).

[10] Section 121.150(6) provided, in relevant part, that:

> No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than five hundred dollars ($500) from any person, permanent committee, or contributing organization in any one (1) election. . . . No person, permanent committee, or contributing organization shall contribute more than five hundred dollars ($500) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf in any one (1) election.

Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1996 Acts Issue).

Fifth, plaintiffs alleged that § 121.150(10), which limited annual aggregate contributions by individuals to all permanent committees to $1,500, violated both the Free Speech and Freedom of Association Clauses.[11] Finally, plaintiffs alleged that § 121A.030(4), which effectively limited to $150,000 the aggregate amount a gubernatorial candidate could receive from all permanent committees combined in any one election year, violated plaintiffs' free speech and associational rights by limiting plaintiffs'

Section 121A.050(1) provided, in relevant part, that:

> A slate of candidates . . . shall not knowingly accept a contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization of more than five hundred dollars ($500) in any one (1) election. Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than five hundred dollars ($500) in any one (1) election.

Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1996 Acts Issue).

[11] Section 121.150(10) provided, in relevant part, that:

> No person shall contribute more than one thousand five hundred dollars ($1,500) to all permanent committees and contributing organizations in any one (1) year.

Ky. Rev. Stat. Ann. § 121.150(10) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.150(10) (Banks-Baldwin 1996 Acts Issue).

direct contributions to candidates as well as plaintiffs' independent expenditures.[12]

The district court consolidated plaintiffs' request for preliminary injunctive relief with the State's request for summary judgment. The court dismissed plaintiffs' claims premised upon the definitions of contribution and permanent committee for failure to state a case or controversy because the Registry had never interpreted those definitions as broadly as plaintiffs' asserted.[13] It then dismissed plaintiffs' challenge to § 121.035(2), which prohibited corporate employees from various involvement in corporate campaign contributions, based upon the same rationale. The court rejected plaintiffs' standing argument that the allegedly overbroad definitions sufficiently "chilled" plaintiffs' exercise of their First Amendment rights because none of the challenged provisions had ever been enforced against plaintiffs, nor did the State have any intention of future enforcement. The district court then upheld the remaining provisions against plaintiffs'

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[12] Section 121A.030(4) provided, in relevant part, that:

> A slate of candidates for Governor and Lieutenant Governor . . . may receive contributions from permanent committees which, in the aggregate, shall not exceed twenty-five percent (25%) of the qualifying contributions received by the slate of candidates in any one (1) election up to a maximum of one hundred fifty thousand dollars ($150,000) in any one (1) election.

Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1996 Acts Issue).

[13] The specific claims dismissed upon this rationale were challenges to §§ 121.025 and 121.180(6)(a).

First Amendment challenges, concluding that each of these provisions was necessary to combat actual and perceived corruption in Kentucky politics.

D. Legislative Intervention

Plaintiffs appealed the district court decision to this Court. After plaintiffs filed their initial appellate brief, the Kentucky General Assembly amended the Act during its regular session. Gen. Ass. HB130, 1996, Reg. Sess. (Ky. 1996); Gen. Ass. HB 695, 1996, Reg. Sess. (Ky. 1996). These amendments directly affect many of plaintiffs' challenges.[14]

First, the Kentucky General Assembly amended § 121.015(3), explicitly narrowing the definition of "permanent committee" to encompass only those organizations which expressly advocate the election or defeat of clearly identified candidate(s).[15] Second, the Assembly

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[14] In fact, many of the amendments appear to be in direct response to plaintiffs' suit.

[15] The amended version of § 121.015(3)(c) now reads, in pertinent part:

> Permanent committee . . . means a group of individuals, including an association, committee, or organization, other than a campaign committee, political issues committee, inaugural committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose *expressly advocating the election or defeat of one (1) or more clearly identified candidates, slate of candidates, or political parties, which functions on a regular basis throughout the year.*

Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-Baldwin 1996 Acts Issue), *as amended,* (emphasis added).

amended § 121.015(6), deleting the language upon which plaintiffs' relied to argue that the term "contribution" encompassed issue advocacy expenditures, as well as explicitly exempting independent expenditures from the definition.[16] Third, the Assembly amended § 121.035 to allow corporations to contribute funds in connection with issues of public importance and to allow non-profit corporations to make independent expenditures.[17] Fourth, the Assembly amended § 121.190(1) to require sponsor identification upon independent expenditures, but not

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[16] The amended version of § 121.015(6)(e), now at § 121.015(7)(c), reads, in pertinent part:

> Notwithstanding the foregoing meanings of 'contribution', the word shall not be construed to include:
>
> (c) An independent expenditure by any individual or permanent committee.

Ky. Rev. Stat. Ann. § 121.015(7)(c) (Banks-Baldwin 1996 Acts Issue), *as amended*.

[17] The amended version of § 121.035 now reads, in pertinent part:

> Nothing in this section shall be construed to prohibit a corporation from making contributions in support of a constitutional amendment, a public question which appears on the ballot, or position on an issue of public importance. Nothing in this chapter shall be construed to prohibit a not-for-profit corporation, which does not derive a substantial portion of its revenue from for-profit corporations, from making independent expenditures.

Ky. Rev. Stat. Ann. § 121.035(3) (Banks-Baldwin 1996 Acts Issue), *as amended*.

issue advocacy expenditures.[18] Finally, the Assembly raised the dollar limitations on contributions by individuals and permanent committees to political candidates contained in §§ 121.150(6) and 121A.050(1) from $500 to $1,000.[19]

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[18] The amended version of § 121.190(1) reads, in pertinent part:

> All newspaper or magazine advertising posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements *which expressly advocate the election or defeat of a clearly identified candidate, slate of candidates, or group of candidates* . . . shall be identified by the words "paid for by" followed by the name and address of the individual or committee which paid for the communication.

Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1996 Acts Issue), *as amended*, (emphasis added).

[19] The amended version of § 121.150(6) reads, in pertinent part:

> No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than one thousand dollars ($1,000) from any person, permanent committee, or contributing organization in any one (1) election. . . . No person, permanent committee, or contributing organization shall contribute more than one thousand dollars ($1,000) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf in any one (1) election.

Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1996 Acts Issue), *as amended*.

Keeping this extensive framework in mind, we now turn to the merits of plaintiffs' appeal.

II. Discussion

We review the district court's grant of summary judgment in favor of the State of Kentucky de novo. *Kentry v. Bank One*, 92 F.3d 384, 389 (6th Cir. 1996).

A. Mootness Issue

The State contends that the recent statutory amendments effectively moot various challenges brought by plaintiffs in the district court. First, the State asserts that the amendments explicitly excluding independent expenditures and issue advocacy expenses from the definition of contribution moot plaintiffs' challenge to § 121.025. Second, the State asserts that the amendments which allow corporations to contribute funds in connection with

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The amended version of § 121A.050(1) reads, in pertinent part:

> A slate of candidates . . . shall not knowingly accept a contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization of more than one thousand dollars ($1,000) in any one (1) election. Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than one thousand dollars ($1,000) in any one (1) election.

Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1996 Acts Issue), *as amended*.

issues of public importance and to allow non-profit corporations to make independent expenditures moot plaintiffs' challenge to § 121.035. Third, the State asserts that the amendments narrowing the definition of permanent committee to encompass only those organizations which expressly advocate the election or defeat of clearly identified candidate(s) moot plaintiffs' challenge to § 121.080(6). Finally, the State asserts that the amendments to § 121.190(1) requiring sponsor identification upon independent expenditures, but not issue advocacy expenditures, moot plaintiffs' challenge to that section to the extent it is based upon the statute's application to issue advocacy expenditures. Plaintiffs respond that all claims are still properly before this Court because the Kentucky General Assembly remains free to reenact the prior statutory scheme.[20]

Article III of the Constitution confines the power of the federal courts to adjudication of "cases" or "controversies". U.S. Const. art. III, § 2. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The mootness doctrine, a subset of the Article III justiciability requirements, demands a live case-or-controversy when a federal court decides a case. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Legislative repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form. *See, e.g., Kremens v. Bartley*, 431 U.S. 119, 129 (1977); *Hall v. Beals*, 396 U.S. 45,

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[20] Neither party disputes that plaintiffs' remaining challenges to §§ 121.025, 121.190(1), 121.150(6), 121A.050(1), 121.150(10) and 121A.030(4) are properly before this Court.

48 (1969). Applying this principle in the First Amendment context, the Supreme Court has routinely declared moot those claims effectively nullified by statutory amendment pending appeal. *Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989); *Bigelow v. Virginia*, 421 U.S. 809, 817-18 (1975). Both *Oakes* and *Bigelow* involved First Amendment overbreadth challenges implicit as defenses to criminal prosecution. In each case, the Court refused to reach the First Amendment arguments because legislative amendment of the challenged statute while the case was pending rendered the issue moot. *See Bigelow*, 421 U.S. at 817-18; *Oakes*, 491 U.S. at 583-84. The plurality in *Oakes* emphasized that *Bigelow* "stands for the proposition that overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed." *Oakes*, 491 U.S. at 582. Accordingly, overbreadth challenges to statutes become moot when the challenged language is effectively nullified by subsequent statutory amendment.

We agree with the State that under *Bigelow* and *Oakes* plaintiffs' challenges to §§ 121.025, 121.180(6)(a), 121.035(2), and 121.190(1) must be dismissed as moot to the extent those challenges are effectively nullified by the recent statutory amendments. This conclusion results in dismissal on appeal of plaintiffs' challenges to §§ 121.180(6)(a) and 121.035(2) in their entirety. In addition, plaintiffs' challenges to § 121.025 premised upon that section's alleged limitation of independent expenditure and issue advocacy expenses are also moot. Finally, plaintiffs' challenge to § 121.190(1) has likewise been mooted to the extent plaintiffs challenge the statute's application to issue advocacy expenses.

Plaintiffs' attempt to analogize the case at bar to *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289-90 (1983) fails. In *Aladdin's Castle*, the district court declared unconstitutional an ordinance passed by the City of Mesquite. *Id.* at 285-89. The City then repealed the ordinance before the case reached the Supreme Court. *Id.* at 287-88. The Supreme Court held that the City's repeal of the ordinance did not moot the appeal because it "would not preclude [the City] from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289. Critical to the Court's decision, however, was the City's announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot.[21] *Aladdin's Castle*, 455 U.S. at 289-90. This essential fact, which created the case-or-controversy before the Supreme Court in *Aladdin's Castle*, is absent from plaintiffs' case.

Aladdin's Castle can best be characterized as an example of the "voluntary cessation" exception to the general rule that legislative repeal of a statute renders a case moot. *See* Erwin Chemerinsky, *Federal Jurisdiction* 136 (1994) (case should not be considered moot under voluntary cessation exception to the mootness doctrine "if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time"). This

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[21] The established practice for dealing with a case which has become moot on appeal is to vacate the judgment below. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). In *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1983), this remedy would have resulted in vacation of the district court's decision declaring the ordinance unconstitutional, opening the door for the City to reenact the original ordinance. 455 U.S. at 289.

exception properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation. The record before us is devoid of any expressed intention by the Kentucky General Assembly to reenact the prior legislative scheme. In fact, the state's prior conduct points toward the opposite conclusion. For over twenty years, the State has not enforced against plaintiffs the challenged portions of the Act. The amended Act now makes this enforcement policy explicit. Gen. Ass. HB130, 1996, Reg. Sess. (Ky. 1996), *amending* Ky. Rev. Stat. Ann. § 121.010, *et seq.* Given these amendments, "there is no possibility now that the statute's pre-[1996] form will be applied . . . to appellant or will chill the rights of others." *Bigelow*, 421 U.S. at 817-18. *Aladdin's Castle* is inapposite, and plaintiffs' challenges to §§ 121.025, 121.180(6)(a), 121.035(2), and 121.190(1) effectively nullified by the statutory amendments are dismissed as moot.

B. Plaintiffs' Remaining Challenges

1. Prohibition on Direct Corporate Contributions to Candidates

Plaintiffs' remaining challenge to § 121.025 contends that the statute unconstitutionally prohibits nonprofit corporations from making direct contributions to candidates for political office. Plaintiffs argue that unlike for-profit corporations, which may be prohibited from making direct contributions to candidates for public office, nonprofit corporations simply do not present a significant threat of corrupting the political process.

The Supreme Court addressed the issue of limiting direct corporate contributions to candidates in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982) [hereinafter *NRWC*]. In *NRWC*, the Court upheld federal restrictions upon corporate solicitation of campaign funds from individuals. *Id.* Although the general purpose of the challenged statute in *NRWC* was to "prohibit contributions or expenditures by corporations . . . in connection with federal elections," the statute permitted corporations to make limited campaign contributions from separate segregated funds solicited explicitly for that purpose. *Id.* at 201-02. In upholding the statute, the Court implicitly concluded that Congress could prohibit direct contributions by corporations to candidates for public office. *See Federal Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985) (noting that *NRWC* upheld "the prohibition of corporate campaign contributions to political candidates").

Plaintiffs argue that the reasoning underlying *NRWC* does not apply to nonprofit corporations like KRL because nonprofit corporations do not have the resources to amass the political "war chests" which spurred Congress to enact the statute at issue in *NRWC*. In *NRWC*, the Court recognized that this ability to amass great financial resources is irrelevant to Congress's authority to enact broad legislation limiting direct contributions by corporations to political candidates. *Id.* at 209-10 (the statute "restricts . . . corporations and labor unions without great financial resources, as well as those more fortunately situated"). In addressing the constitutionality of these federal restrictions on corporate campaign solicitation,

the Supreme Court noted Congress's "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* Although the Court did not explicitly note the distinction between nonprofit and for-profit corporations, the majority rejected a nonprofit corporation's challenge to the restrictions. *Id.* at 199. The Court deferred to Congress's determination that the potential for influence over the political process demanded regulation. *Id.* at 210. Despite the statute's broad application, the Court refused to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.*

Plaintiffs' reliance upon *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) [hereinafter *MCFL*], to create a meaningful distinction between for-profit and nonprofit corporations is similarly misplaced. Although the Court in *MCFL* recognized a distinction between these two corporate forms in analyzing the constitutionality of campaign finance regulation, that case dealt specifically with the issue of limiting independent expenditures by corporations, not direct contributions by corporations. *MCFL*, 479 U.S. at 251. The majority in *MCFL* distinguished the holding of *NRWC* by noting that while the statute in *NRWC* applied to both for-profit and nonprofit corporations, that statute only addressed the issue of direct contribution limitations, not independent expenditures. *MCFL*, 479 U.S. at 259. In justifying the holding in *NRWC*, the Court in *MCFL* stated, "We have consistently held that restrictions on [direct] contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-60.

Therefore, although the Court in *MCFL* distinguished between nonprofit and for-profit corporations with respect to independent expenditures, it reiterated the *NRWC* conclusion that a legislature may restrict direct contributions to political candidates from both for-profit and nonprofit corporations in order to limit the potential for corruption commensurate with those contributions. *Id.* Consequently, plaintiffs' distinction between nonprofit and for-profit corporations simply does not apply to regulation of direct corporate contributions.

In sum, we believe that the reasoning of *NRWC* applies directly to plaintiffs' challenge to § 121.025. In both *NRWC* and the case at bar, the goal of the legislature is to reduce actual and perceived corruption in the political process. Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the Kentucky General Assembly's restrictions. We reject plaintiffs' contention that § 121.025 unconstitutionally prohibits nonprofit corporations from making direct contributions to candidates for political office.

2. Identification Disclaimer

Also remaining following legislative amendment is plaintiffs' challenge to § 121.190(1). Plaintiffs allege that this statute infringes plaintiffs' First Amendment right to "publish anonymously" by requiring identification of the sponsor to be placed upon every independent expenditure.

Two Supreme Court cases, *Buckley v. Valeo*, 424 U.S. 1 (1976) and *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995), provide the parameters for our analysis of this issue.

In *Buckley*, the seminal decision on campaign regulation, the plaintiffs brought First Amendment challenges to various provisions of the Federal Election Campaign Act of 1971. These provisions required federal campaign contributors to report their direct candidate contributions, as well as any independent expenditures, to the Federal Election Commission. *Buckley*, 424 U.S. at 63-64. Using a strict scrutiny analysis, the Supreme Court permitted these restrictions upon plaintiffs' First Amendment rights because they were narrowly tailored to directly serve three substantial governmental interests: 1) notifying the public of the source of campaign funds; 2) preventing actual and perceived corruption in the political process; and 3) creating a recordkeeping method to detect violations of the Campaign Act's contribution limitations. *Id.* at 64-68. The Court balanced these interests against the free exercise of First Amendment rights and concluded that the reporting requirements were constitutional because they were narrowly tailored to further these interests. The Court's approach in *Buckley* provides the constitutional framework for analyzing First Amendment challenges to campaign contribution regulations.

At the other end of the spectrum is the more recent case of *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995), which addressed the specific issue of the constitutionality of mandatory identification disclaimers. At issue in *McIntyre* was an Ohio ordinance requiring mandatory identification disclaimers on issue advocacy

expenditures. Id. at 1514. The Court noted that the mandatory reporting requirements upheld in *Buckley*, while certainly an intrusion on First Amendment rights, reveal far less information than the mandatory identification disclaimers *sub judice*. *Id.* at 1523. Furthermore, in contrast to the independent expenditure regulations addressed in *Buckley*, the *McIntyre* Court found that the public's concern with preventing corruption was greatly diminished in the context of issue advocacy expenditures. *Id.* at 1523-24. Based upon these factors, the Court struck down the ordinance.[22] Of particular relevance to this case, the *McIntyre* majority highlighted the significant possibility of corruption commensurate with independent expenditures and recognized that the potential for corruption associated with issue advocacy expenditures is significantly lower because issue advocacy expenditures do not directly support political candidates.[23] *Id.* Accordingly, the government's interest in limiting political

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[22] Although the statute in *McIntyre* applied to both issue advocacy expenses and independent expenditures, *McIntyre* ruled only on an issue advocacy advertisement. As Justice Ginsburg's concurrence noted, the majority decided not to address the ordinance's application to independent expenditures, but rather chose to "leav[e] open matters not presented by [issue advocacy advertisements]." *Id.* at 1524.

[23] The Court hinted at possible approval of identification disclaimers on independent expenditures by noting that "*Buckley* may permit a more narrowly drawn statute" than the Ohio ordinance, which covered both issue advocacy expenditures and independent expenditures. *McIntyre*, 115 S. Ct. at 1524. Furthermore, in her concurrence Justice Ginsburg stated that "a State's interest in protecting an election process might justify a more limited identification requirement." *Id.* at 1524 (Ginsburg, J., concurring) (*quoting* majority opinion at 1522). Presumably, these references to a 'more limited

corruption is stronger when independent expenditures, as opposed to issue advocacy expenditures, are regulated.

The challenges presented in *Buckley* and *McIntyre* can best be characterized as two points on a continuum, with plaintiffs' challenge falling somewhere between them. *Buckley* balanced substantial government interests in combatting corruption in the political process against the First Amendment infringement of reporting requirements and concluded that those interests outweighed the limited infringement. *McIntyre* then applied the reasoning of *Buckley* and concluded that the additional First Amendment burdens exacted by requiring identification disclaimers on issue advocacy expenditures outweighed the state's more limited interest in identifying proponents of issue advocacy.

Like *Buckley*, Kentucky's substantial interests in notifying the public of the source of campaign expenditures, along with preventing actual and perceived corruption in the political process, are clearly implicated. Like *McIntyre*, the disclaimer provision at issue in this case places a more onerous burden on plaintiffs than the reporting requirements analyzed in *Buckley*.

The identification disclaimer requirement in § 121.190(1) clearly implicates First Amendment protection because it burdens core political speech. *McIntyre*, 115 S.Ct. at 1518-19. When a statute burdens First Amendment rights, it must be "narrowly tailored to serve

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identification requirement' point to a statute like the one in the case at bar, which requires identification disclaimers only on independent expenditures.

an overriding state interest." *Id.* at 1519. The State asserts that § 121.190(1) prevents actual and perceived corruption by immediately notifying the public of any possible allegiance a particular candidate may feel toward the publisher. The State also asserts that it provides the Registry with a method of detecting those expenditures which are not truly independent by providing a paper trail to detect violations by unscrupulous PACs routing expenditures through individuals. Under *Buckley,* these are both substantial governmental interests. *Buckley,* 424 U.S. at 66-68. Applying the analysis of *Buckley,* we believe the identification disclaimer for independent expenditures contained in § 121.190(1) is narrowly tailored toward achieving those goals. Therefore, plaintiffs' First Amendment challenge to § 121.190(1) is rejected.

3. Dollar Limitation Upon Direct Contributions

Plaintiffs also challenge §§ 121.150(6) and 121A.050(1) of the Act, which effectively limit to $1,000 the amount any individual or permanent committee can contribute to any one political candidate in any one election year, alleging that these provisions violate the Freedom of Association Clause by limiting plaintiffs' ability to fully ally themselves with candidates of their choice.

In *Buckley,* the Supreme Court upheld a nearly identical $1,000 limitation on direct contributions in the context of federal elections. *Buckley,* 424 U.S. at 23-35. In doing so, the Court stressed that the judiciary should not take out a scalpel to probe dollar limitations because "distinctions in degree become significant only when they can be said

to amount to differences in kind." *Id.* at 30. We believe that the Act's $1,000 limitation on direct contributions in connection with local and state elections in Kentucky is not different in kind from the $1,000 limitation on direct contributions in connection with federal elections upheld in *Buckley*. Therefore, we uphold the $1,000 limitations against plaintiffs' First Amendment challenge.[24]

4. Dollar Limitation Upon Aggregate Contributions

Plaintiffs also challenge § 121.150(10), which limits to $1,500 the aggregate contributions by an individual to all permanent committees within a one year period. Plaintiffs allege that this provision violates both the Free Speech and Freedom of Association Clauses of the First Amendment.

Section 121.150(10) does not limit direct contributions to candidates or independent expenditures to support candidates. Rather, it only limits aggregate contributions to permanent committees, which generally have full discretion to disburse the funds in any manner. Plaintiffs' challenge, therefore, involves what the Supreme Court has characterized as "speech by proxy" because the actual expenditure is made by the permanent committee,

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[24] We also note that plaintiffs' attorney, when addressing the constitutionality of the $500 limitations in the district court, suggested that a $1,000 limitation would be appropriate. Plaintiffs' attorney reiterated this view when he essentially conceded at oral argument that the $1,000 limitation on contributions is constitutional under *Buckley*.

not the individual. *California Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981). The Court has clearly stated that this type of political speech, while not entirely unprotected by the First Amendment, does not receive the full First Amendment protection afforded direct political contributions because limitations on contributions to permanent committees do not significantly infringe First Amendment rights. *Id.* at 196-97.

In addition to the limited protection afforded this type of speech, the $1,500 aggregate limit furthers the Act's statutory scheme by preventing evasion of the $1,000 limit upon direct individual contributions to candidates. Absent this aggregate limit, unscrupulous individuals could pass unlimited amounts of cash to permanent committees with the understanding that those funds would be disbursed directly to specific candidates. *See Buckley*, 424 U.S. at 38 (noting possibility of evasion in upholding similar $25,000 limitation in the context of federal elections). In that sense, the limitation is integral to the effectiveness of the overall statutory scheme of combatting corruption in the political process. *See id. See also Calif. Med. Ass'n.*, 453 U.S. at 198-199.

Furthermore, we do not sit as a super-legislature to second guess the Kentucky General Assembly as to the size of the aggregate limit. *See Buckley*, 424 U.S. at 30 (judiciary should not dissect dollar limitations unless "distinctions in degree become . . . differences in kind.") Local and state elections in Kentucky simply do not involve the enormous financial contributions generally associated with federal elections. Consequently, a relatively small contribution to a local Kentucky campaign

may create a substantial likelihood of corruption. Recognizing these inherent differences between federal and local election expenditures, we believe the $1,500 limit for Kentucky state and local elections does not amount to a difference in kind from the $25,000 limit upheld in *Buckley* in the context of federal elections. It is enough to note that the $1,500 limit furthers the goal of preventing corruption in Kentucky politics by avoiding evasion of the individual contribution limitations. This goal of combatting corruption, combined with the limited protection afforded this type of speech, compels the conclusion that § 121.150(10) is constitutional.

We also note plaintiffs' challenge to the Act's disparate treatment between aggregate contributions to permanent committees and aggregate contributions to candidates. As noted previously, the Act limits to $1,500 the amount an individual may contribute to all permanent committees in any one election year. It does not, however, place a similar aggregate limitation upon the amount of cash an individual may contribute to all political candidates in that same year. As a result, the Act treats permanent committees and political candidates differently with respect to aggregate contribution limits.

Nevertheless, the Act's distinction between permanent committees and political candidates does not render it unconstitutional. The Supreme court rejected a similar argument in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981), finding no evidence of actionable discrimination in a similar statute because the disparate treatment between individuals and permanent committees "reflect[ed] a judgment by [the legislature] that these entities have differing structures and

purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id.* at 201. The disparate treatment under Kentucky's Campaign Finance Law reflects an analogous legislative determination that aggregate limitations are necessary to prevent manipulation of permanent committees in order to evade the Act's $1,000 limitation on direct contributions to any one political candidate. The Kentucky General Assembly chose not to enact a similar aggregate limitation for political candidates, perhaps because the Assembly viewed it as unnecessary given this $1,000 limitation. Regardless of the Assembly's rationale, the disparate treatment which plaintiffs allege simply does not rise to the level of rendering the statute unconstitutional.

5. Dollar Limitation Upon Gubernatorial Candidates

Finally, plaintiffs challenge § 121A.030(4), which effectively limits to $150,000 the aggregate amount a gubernatorial candidate may receive from all permanent committees combined in any one election year.[25] Plaintiffs

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[25] This $150,000 aggregate limit is reached differently depending upon whether or not the candidate receives disbursements from Kentucky's Election Campaign Fund (the "Fund"). For those individuals who choose not to receive disbursements from the Fund, the statutory limit is explicitly set at $150,000. Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1996 Acts Issue). In contrast, those candidates who receive disbursements from the Fund are limited by interrelated provisions. Those candidates are entitled to receive two dollars from the Fund for every dollar they raise in political

claim this statute violates their free speech and associational rights by limiting plaintiffs' direct contributions to candidates.[26]

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contributions, *up to a total of $600,000 raised*. Ky. Rev. Stat. Ann. § 121A.060(2)(c) (Banks-Baldwin 1996 Acts Issue) (emphasis added). Aggregating this $600,000 of raised political contributions with the $1,200,000 disbursement received from the Fund (two dollars for each dollar raised) yields a total of $1,800,000 available to the candidate. This total provides the maximum amount a candidate who receives disbursements from the Fund can expend for campaign purposes in any one election year. Ky. Rev. Stat. Ann. § 121A.030(1) (Banks-Baldwin 1996 Acts Issue).

This $1,800,000 budget still includes only $600,000 of political contributions raised independently by the candidate. Of that $600,000, only 25% may be received from permanent committees. Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1996 Acts Issue). That equates to an effective limit of $150,000 on the amount a gubernatorial candidate receiving disbursements from the Fund may accept from permanent committees in any one election year. Therefore, whether or not a candidate receives disbursements from the Fund, that candidate is limited to receiving a total of $150,000 from all permanent committees combined.

[26] Section 121A.030(4) only applies to permanent committees. The recent statutory amendments clarified that KRL is not a permanent committee, nor is Mr. Zoeller. Therefore, plaintiffs' challenge to § 121A.030(4) is moot with respect to those two plaintiffs. However, because KRLPAC remains a permanent committee following the statutory amendments, we still must address plaintiffs' challenge.

In addition, plaintiffs' contention that § 121A.030(4) limits the dollar value of independent expenditures a gubernatorial candidate may "receive" from permanent committees has been mooted by the amendments clarifying that independent expenditures are not included within the statutory definition of contribution.

Again, statutes which infringe upon First Amendment freedoms must be narrowly tailored to further substantial government interests. *Buckley*, 424 U.S. at 64-68. However, when core First Amendment rights are not significantly affected, the regulated speech is not entitled to full First Amendment protection. *California Med. Ass'n.*, 453 U.S. at 196. Section 121A.030(4) will seldom infringe upon First Amendment freedoms because it will rarely restrict contributions by permanent committees to gubernatorial candidates. Regardless of the limitations in § 121A.030(4), the Act still limits to $1,000 the amount a permanent committee can contribute directly to a candidate in any one election year. Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1996 Acts Issue). Assuming that a gubernatorial candidate raises a total of $600,000 in direct political contributions, up to $150,000 of that money may come directly from permanent committees. If each permanent committee contributes the statutory maximum of $1,000, this corresponds to a total of one-hundred and fifty different permanent committees with the ability to contribute to that candidate. Therefore, the $150,000 limitation contained in § 121A.030(4) would only apply to the one-hundred and fifty-first permanent committee that wishes to contribute to that candidate. Given this unlikely scenario,[27] this limitation upon plaintiffs' First Amendment rights is nearly imperceptible.

Furthermore, § 121A.030(4) attempts to eliminate perceived corruption in the political process by limiting the

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[27] The district court noted that nothing in the record indicates that the provision has limited PAC contributions in the past or is likely to do so in the future.

total amount of funds gubernatorial candidates may accept from groups with vested interests.[28] The Supreme Court has consistently held that preventing perceived corruption is a compelling state interest. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) (*citing NCPAC*, 470 U.S. at 496-97). Legislatures must constantly regulate vested interests that have the ability to amass large political war chests. *See NRWC*, 459 U.S. at 207 (acknowledging Congress's authority to regulate corporate political expenditures). Recognizing this problem, the Supreme Court has upheld dollar limitations upon direct contributions by PAC's to political candidates. *See Buckley*, 424 U.S. at 23-35. Section 121A.030(4)'s limitations upon gubernatorial candidates' receipt of funds from permanent committees merely represents the flip-side of this same issue. Given that the direct contribution limits in *Buckley* withstood strict scrutiny, we hold that the contribution limit at issue here also survives First Amendment challenge. The minimal speech restriction placed upon permanent committees by § 121A.030(4), combined with the state's compelling interest in combatting perceived corruption justifies this limited infringement upon First Amendment rights. Consequently, plaintiffs' challenge to § 121A.030(4) is rejected.

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[28] In contrast, the direct contribution limits in the Act attempt to combat actual corruption by eliminating the "financial quid pro quo: dollars for political favors." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) [hereinafter *NCPAC*].

III. Conclusion

Plaintiffs' claims that are effectively nullified by the statutory amendments are moot. Plaintiffs' remaining challenges are rejected on their individual merits. In summary, the provisions at issue in this case all survive plaintiffs' First Amendment challenges. Therefore, the decision of the district court is **affirmed.**

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CIVIL ACTION NO. 3:95CV582-H

KENTUCKY RIGHT TO LIFE, et al. PLAINTIFFS

v.

NICHOLAS KING, et al. DEFENDANTS

MEMORANDUM OPINION

This case calls upon the Court to consider the extent to which governments may regulate the manner and scope of political expression. Kentucky Right to Life, Inc. ("KRL"),[1] its Political Action Committee, ("KRL PAC") and an individual supporter have challenged the constitutionality of several parts of Kentucky's Campaign Finance Law, KRS 121.010, *et seq.*, and KRS 121A.010, *et seq.* (the "Act"). The Defendants are the appointed members of the Kentucky Registry of Election Finance (the "Registry"), who have the major responsibility to administer and enforce the Act, the Commonwealth Attorney of Jefferson County and the State Attorney General, each of whom have enforcement authority under the Act.

This case does not turn upon Plaintiffs' particular social and political agenda. They make no claim that it does. In essence, Plaintiffs present grievances which similarly affect all other special interest groups, political

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[1] For purposes of the record, the parties stipulated that KRL is a non-profit corporation, with little or no business income and with minimal contributions from for-profit corporations.

action committees or individuals, regardless of their view on this or any other issue.

The Supreme Court has found its way to a certain First Amendment safe harbor. The "fountainhead" case *Buckley v. Valeo*, 424 U.S. 1 (1976), defines the broad reaches of that harbor. Since then Supreme Court has been charting the shoreline in greater detail. *See California Med. Assoc. v. Federal Elec. Com'n.*, 453 U.S. 182 (1981); *Federal Elec. Com'n. v. National Right to Work*, 459 U.S. 197 (1982); *Federal Elec.Com'n. v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); and *McIntyre v. Ohio*,___U.S.___, 115 S. Ct. 1511 (1995).

From these cases, we know that the First Amendment provides the broadest protection to the most fundamental of all speech, political expression. Political association receives the same protection as political expression. Because freedom of association and freedom of expression are so fundamental to our society, any action curtailing either one is subject to the most exacting scrutiny. Nevertheless, it is beyond reproach that the state may interfere with those rights to serve an overriding or compelling state interest.

No one disputes that the goal of limiting political corruption or its appearance is a compelling state interest. In Kentucky its importance is particularly compelling given the recent history of indictments and corruption at all levels of government. But even in the most compelling circumstances any restriction on political speech must be narrowly or closely tailored to advance that interest and avoid unnecessary infringement of political speech.

All the foregoing cases reflect the robust debate and constitutional nuances characteristic of First Amendment issues. While they have charted us to shore, they have yet to explore some of the tricky First Amendment shoals which now confront this Court.

I.

Kentucky's campaign finance law is a comprehensive legislative framework, enacted at various times over the past twenty years and designed to prevent corruption and the appearance of corruption in Kentucky elections. In its present form, the Act includes among other things extensive registration and disclosure requirements, limits upon individual contributions to candidates and political action committees, limits on contributions from PACs to candidates, incentives for gubernatorial candidates to limit the amount of contributions they receive and to accept public financing, prohibitions on corporate contributions to candidates, regulation of campaign expenditures and appointment of members to oversee administration of the Act. Finally, the Act is enforced through its civil and criminal penalty provisions.

Plaintiffs contend that the Act unconstitutionally restricts their fundamental right to engage in free political speech. They say that it does so in the following seven distinct ways:

(1) The definition of "contribution" contained in KRS 121.015(6)(e) and in KRS 121A.010(11), in conjunction with the prohibition on corporate contributions to candidates in KRS 121.025, restricts KRL from making

"independent expenditures" and from engaging in issue advocacy.

(2) The definition of "permanent committee"[2] contained in KRS 121.015(3)(c) and in KRS 121A.010(9)(c) requires KRL to register in accordance with KRS 121.180(6)(a) and prohibits KRL from making "independent expenditures" or engaging in issue advocacy in accord with KRS 121.035(2).

(3) KRS 121.190(1) requires that all Plaintiffs place disclaimers on independent expenditures.

(4) KRS 121.150(6) and KRS 121A.050(1) prohibits KRL and KRL PAC from making contributions to candidates, including "independent expenditures," in excess of $500.

(5) KRS 121.150(10) places a limit of $1500 upon the aggregate amount which an individual may contribute to all permanent committees.

(6) KRS 121A.030(4) prohibits KRL PAC from knowingly making contributions to candidates for governor, and it also prohibits those candidates from accepting contributions from KRL PAC that exceed 25 percent of the total contributions which a candidate receives.

(7) KRS 121.180(6)(b) requires KRL and KRL PAC to pay a five percent "administrative fee" on all contributions to candidates, including those for "independent expenditures."

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[2] A "permanet committee" is the legislative name for those entities commonly known as political action committees or PACs.

Although the analysis of those specific provisions is necessarily interrelated, the Court will consider each in turn. Because all parties view the issues here as purely legal, the Court will merge the request for preliminary injunction with consideration on the merits.

II.

Neither of Plaintiffs' first two challenges presents justiciable issues.

KRL complains that the Act's definition of "contribution" in KRS 121.025(6)(e) and in KRS 121A.010(11) prohibits it from expending funds for issue advocacy and from making independent expenditures.[3] KRL also contends that the Act's definition of a "permanent committee" produces the same unconstitutional impediment to unfettered political speech.

Plaintiffs' complaints come notwithstanding the Registry's insistence that it intends no such interpretations. Moreover, Defendants' intentions are grounded in reasonable views of the Act.[4] During the 20 year history of

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[3] During oral argument KRL disclaimed the right to make direct contributions to candidates. During a subsequent telephone conference counsel asserted that such a ban would be impermissible. However, the Supreme Court has upheld the prohibition of direct corporate contributions to candidates similar to that contained in KRS 121.035. *See Federal Election Commission v. Right to Work Committee*, 459 U.S. 197 (1982). *Also see* infra n.4.

[4] No doubt the definition of "expenditure" contained in KRS 121.025(6)(e) may be overly broad. But KRS 121.150(1) clearly places the subset of "independent expenditures" in a

the Act, the Registry has never proposed the expansive interpretations which Plaintiffs now suggest. To accept KRL's view requires complete adherence to its stark reading of the Act, not to mention ignoring some 20 years of Supreme Court jurisprudence.

Nevertheless, Plaintiffs contend that these definitions chill their participation in political debate. While disdaining an advisory opinion, they claim to fear that the Registry will change its enforcement policy. Under the circumstances presented, and based upon the Registry's reasonable interpretation, these fears are hypothetical at best and are wholly unjustified. This Court need not offer an advisory opinion for every conceivable statutory interpretation.

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separate category. The term "independent expenditure" is not one which the Registry or the legislature invented. Since at least 1976 it has existed as a term of art in the jurisprudence of American politics and First Amendment law. *See Buckley*, 424 U.S. at 45-47. The Act, albeit in a somewhat tortured fashion, follows what the Supreme Court has made absolutely clear: an organization such as KRL may make independent expenditures expressly advocating election of particular candidates. *Federal Elec. Com'n v. Massachusetts Citizens for Life*, 479 U.S. at 264-265.

Though other parts of the Act may apply to and prohibit certain corporate activities, the definition of a "permanent committee" in KRS 121A.010(9) does not include "corporations" within its general scope or among its specific examples. KRL's fears to the contrary cannot make it so. Nothing in KRS Chapter 121 expressly requires that KRL register to avail itself of the privilege of participating in issue advocacy or political debate. The focus of the Act is not upon the status of a group, but rather upon its activities. Groups which intend to make direct contributions to candidates must register.

Plaintiffs' complaints do not raise a justiciable controversy. The Court will deny their relief as moot.

II.

Plaintiffs contend that KRS 121.190(1) is an unconstitutionally broad restriction on their First Amendment Rights because (1) it requires a disclaimer contrary to the Supreme Court's holding in *McIntyre v. Ohio Election Commission* and (2) it regulates speech based upon the state of mind of the persons paying for the advertisement.[5] In *McIntyre,* the Supreme Court upheld the right of persons to make anonymous statements or advertisements on public issues. Plaintiffs' challenge raises the fundamental

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[5] KRS 121.190(1) states:

> All newspaper or magazine advertising poster, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements with reference to or intended for, the support or defeat of a candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words "paid for by" followed by the name and address of the payer, or the committee, organization, or association and its treasurer, on whose behalf the communication appears; except that if paid for by a candidate, slate of candidates, or campaign committee, it shall be identified only by the words "paid for by" followed by the name of the candidate, slate of candidates, or campaign committee, whichever is applicable. For television and radio broadcasts, compliance with Federal Communications Commission regulations regarding sponsored programs and broadcasts by candidates for public office shall be considered compliance with this section.

issue of whether *McIntyre's* rationale would extend the protection of anonymity to independent expenditures in support of candidates.

A thorough review of both *Buckley* and *McIntyre* impresses the Court that the Supreme Court has yet to intend prohibition of disclaimers on candidate advocacy. Unquestionably, *McIntyre* does not go so far on its facts. At bottom, *McIntyre* rests upon the conclusion that the state has no compelling interest in avoiding anonymous issue pamphleteering because there is little possibility for corruption. Consequently, in *McIntyre*, even though the restraint on speech was modest, it did not survive strict scrutiny. Read together, *Buckley* and *McIntyre* comprise two distinct and consistent sides of the whole. Justice Stevens' opinion for the Court dramatizes the point by saying that regulation of issue advocacy "rests on different and less powerful state interests [than the state's compelling interest in uncorrupted candidate election]." *McIntyre*, 115 S.Ct. at 1523.[6]

In our case the disclaimer requirement rests upon a concededly more powerful state interest. The disclaimer advances that interest because so long as the proponent of an independent expenditure is anonymous, there is no way to determine whether the expenditure is truly independent. Moreover, the disclaimer assures that the public will know who is backing a candidate and to whom the candidate may have monied allegiance, if elected. The

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[6] Also see Justice Ginsburg's concurring opinion. *Id.* at 1524.

disclaimer is certainly a narrowly focused approach to assure accountability in political campaigns.

KRL contends that the words "with reference to or intended for" regulate one's state of mind and thus exceed the constitutional limits set forth in *Buckley*. However, the Act has contained that language since 1974. Neither side has identified an occasion whereby the Registry suggested an interpretation or sought enforcement of these provisions inconsistent with *Buckley* and *Massachusetts Citizens For Life*. *Buckley* adopted the "express advocacy" requirement to distinguish more pointed advocacy in support of candidates from discussion more limited to issues. The distinction is important because it separates speech which may be limited under election finance laws from speech which is issue advocacy and may not be regulated.

Because it meets the criteria set forth in *Massachusetts Citizens for Life*, KRL is not subject to the prohibition on corporate independent expenditures. Unless KRL "expressly advocates" the election or defeat of specified candidates, the Act requires no disclaimer at all. Thus, under this definition a broad spectrum of political speech and communication remains absolutely unburdened. The express advocacy of candidates speech to which the disclaimer applies is clearly identified in *Buckley* and is limited in scope. Thus, the Act's disclaimer provisions are narrowly tailored in an area concededly within the state's compelling interest.

Buckley defined by words, not intentions, the bright line which separates issue advocacy from independent expenditures. Any broader reading or suggestion of a

greater burden on speech than that clearly defined in *Buckley* would be impermissible. On this point the parties and the Court agree. Plaintiffs have not presented the Court with a particular communication upon which it contends the Registry has unlawfully required a disclaimer. There remains no issue upon which this Court need provide relief. Consequently, Plaintiffs' claims are moot.

IV.

The individual plaintiff, KRL and KRL PAC contend that the $500 limitations on contributions to political action committees and the limitation on contributions each can make to candidates is not narrowly tailored enough to meet the constitutional requirements announced in *Buckley*. The individual plaintiff contends that the Act's $1500 cap on individual contributions to political action committees is constitutionally infirm for the same reasons.

Restrictions on contributions to candidates do effect the freedom of political speech. However, no one disputes that Kentucky may impose some limitations of this kind. Limitations on contributions to a candidate or to a political action committee entails only marginal restrictions upon the contributor's ability to engage in free communication. *Buckley*, 424 U.S. at 21. Notwithstanding these limitations, individuals and not-for-profit corporations may still spend unlimited resources on independent

contributions or on issue advocacy.[7] Moreover, there are numerous other means of communicating the same political message or of showing support for a candidate or group.

A.

The $500 limitation is the clearer of the two provisions.[8] The question presented is whether the $500 limitation goes too far and beyond what is necessary to accomplish the Act's central purpose of limited political corruption or its appearance. In legal parlance, the Court must determine whether this limitation is tailored narrowly enough.

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[7] If a non-profit corporation as defined in *Mass. Citizens* chooses to make independent expenditures on behalf of a candidate, it need not register and is not subject to any statutory limits on amounts it may receive or spend independently in support of candidates. It need only report the expenditure. KRS 121.050(1). In short, the practical effect of these limitations on the people's right to be heard is minimal as compared to others which courts have rejected. *See* infra n. 12.

[8] Judge Simpson, addressing a slightly different issue, found the $100 contribution limit on privately funded candidates to be "palpably penal and, thus not narrowly tailored to achieve the goal of thwarting quid pro quo corruption." Judge Simpson appeared to proceed from the premise that the $500 limitation was narrowly tailored and was not penal. *Wilkinson v. Jones*, 876 F.Supp. 916 (W.D. Ky. 1995). Now this Court must consider directly what Judge Simpson addressed only by implication.

No one with a working knowledge of our recent political history can doubt that some limitation on contributions will contribute directly to reducing the perception of political corruption in Kentucky. Even if the court doubted the wisdom of the legislature's judgment in addressing the problem or its solution, to voice it is indisputably outside the Court's role in our federal framework. The Supreme Court has wisely counseled us not to reject a reasonable solution so long as its elements are necessary to accomplish a legitimate objective. *Buckley*, 424 U.S. at 31. In this instance, the contribution limitations are necessary because they go to the very heart of the legislature's objective. They are essential to its accomplishment. Who should know better than the legislature what might wash the appearance of monied corruption from our politics? The Court's instinct, which is not entirely without practical experience, is that the legislature's solution is reasonable and does not go beyond what is necessary to accomplish its objective.

However, Plaintiffs suggest that $500 is too low. They say that a $1,000 limitation would pass constitutional muster while $500 does not. Neither party, nor any other court, has suggested a formula by which the Court must

make such a determination.[9] There are none.[10] The Court might well agree with other courts that have found $100 limitations too draconian.[11] However, this Court cannot say the same for the $500 limitation. Where the interest is compelling and where the remedy, as here, clearly advances its most central objective, the Supreme Court has cautioned courts not to take a scalpel to the distinctions of degree. *Buckley*, 424 U.S. at 31. The difference between $500 and $1,000 is a distinction of degree; not one of kind.

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[9] Comparing this limitation to the $1,000 limitation approved in *Buckley*, as some courts have attempted, is unenlightening for a whole host of reasons. Among other things, the difference in the scope of the elections is so immense that comparisons are meaningless. Additionally, the *Buckley* Court did not propose $1,000 as the lower limit, only as an amount which passed constitutional muster.

[10] The Court finds itself in uncharted waters. Neither side cites a case which directly addresses this kind of limitation. However, the cases addressing related issues seem to favor the concepts argued by Defendants. For instance, *Calif. Medical Ass'n v. Federal Elec. Comm.*, 453 U.S. 182 (1981), affirms that "speech by proxy" is not entitled to full First Amendment protection. *Id.* at 197. And, it also reaffirms the compelling interest. *Id.* at 198.

[11] However, neither the logic nor conclusions in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) argue persuasively that the limits here are unconstitutional. *Holahan* is notably distinguishable from our case in that the State of Minnesota sought to ban independent expenditures, a fact which significantly changes the balance of any First Amendment analysis. None of the court's reasons for striking down the $100 contribution limit apply with equal force to the $500 limit here. *Id.* at 1365-1366.

The Court concludes that the $500 cap is within the range of limitations narrowly tailored to meet strict constitutional scrutiny.

B.

The $1500 aggregate limitation on individual contributions to political action committees presents a somewhat more difficult problem. This limitation more directly restricts the right of free association. But it does so in a marginal way because if affects only those persons who desire to contribute the maximum amount to more than three political action committees. It does not impact the numerous other avenues available for supporting candidates, promoting political views or association by membership with such groups. It has no impact upon issue advocacy.

Most important, the provision is absolutely essential to avoid evasion of the Act's central purposes. The $500 and $1500 limitations individually and collectively constitute the Act's primary weapons against the appearance of improper influence stemming from large campaign contributions. Without some limitation of this kind, the Act could not possibly accomplish its primary and lawful purpose.

It is unlikely that contributions to any one PAC will suffer tangibly due to the $1,500 limitation. Individuals may still associate with their chosen group in a variety of other ways. The issue is a close one. Any lesser limitation might well be too extreme. Nevertheless, the Court cannot conclude that the $1,500 limitation with its marginal

restriction of speech is an overly broad solution to a serious and compelling interest.

C.

In general, courts should never hesitate to intervene on the side of unfettered political speech where the restraints are significant and are unrelated to a compelling interest. In each of these instances, however, the restrictions are closely related to the furtherance of the state interest. One cannot assess the constitutionality of a particular provision without considering its context within the entire statutory scheme. *Vote Choice, Inc. v. Distefano*, 4 F.3d 26, 33 (1st Cir. 1993). The Court is impressed that the Act leaves important avenues of political speech completely and appropriately unregulated.[12]

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[12] Plaintiffs often cite *Vote Choice* for the proposition that burdens on associational rights, particularly disparate ones, should not be countenanced. However, there are substantial conceptual differences between Kentucky's regulatory scheme and that enacted in Rhode Island. The Rhode Island statute required that all PACs report the source and amount of every contribution, no matter how small. However, individuals who contributed directly to candidates rather than to PACs, were not subject to such disclosure. *See Vote Choice, Inc. v. Distefano*, 814 F.Supp. 195 (D.R.I. 1993). The Rhode Island statute (1) burdened association rights, (2) created a disparity between the disclosure thresholds for PACs and individuals and (3) bore no relationship to the attainment of a state interest. This was crucial to the First Circuit's decision in *Vote Choice*. 4 F.3d at 34. The Supreme Court disallowed limitations of association expenditures on ballot issues for similar reasons. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 293, 296-297 (1981). KRS 121.010 *et seq.* does not attempt such overreaching regulation on association political speech. This is important

In this context, neither of these contribution limitations are so great as to fall outside a zone of reasonableness.

V.

KRL PAC contends that KRS 121A.030(4), which limits candidates to receiving 25 percent of their funds from permanent committees, places an impermissible burden on its right of free speech. The Court cannot agree.

The burden imposed by the Act is imperceptible.[13] Only if KRL PAC chooses to contribute $500 to a gubernatorial candidate after that candidate has already received $150,000 from other permanent committees is its speech rights limited in any way. However, because *all* contributions are limited by an aggregate of $600,000 per candidate, any potential contributor, whether an individual or a political action committee, theoretically could have their speech rights restricted if they sought to make a contribution after the candidate had received his or her statutory limit from other sources.

Such hypothetical limitations are a marginal restraint on political speech. However, they are a necessary, though unlikely, consequence of the state advancing its compelling interest of reducing the corrupting influence of money in politics. The Supreme Court has upheld

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when considering the challenged provisions within the context of the entire legislative scheme.

[13] There is nothing in the record to indicate the likelihood that the provision has limited PAC contributions to candidates or that it is likely to in the future.

spending limitations generally. *Buckley,* 424 U.S. at 29. The influence of political action committees has been particularly trouble some, thus justifying the limitation described in KRS 121A.030(4).

VI.

KRS 121.180(6) requires that all permanent committees pay an "administrative fee" to the Registry equal to 5 percent of all contributions, including independent expenditures in support of a candidate. KRL PAC contends that this is a restriction upon its speech without any compelling state interest and that it constitutes a denial of equal protection.[14] It is ironic that this most innocuous of limitations should give the Court its greatest concern.

KRS 121.180(6) provides that the Registry shall pay all the administrative fees to the State Treasurer, who shall deposit them with the Election Campaign Fund established by KRS 121A.020.[15] Consequently, none of the funds may be earmarked to cover the Registry's administrative costs. None of them have been used for that purpose. The term "administrative fee," as used in the

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[14] The Court will not address the equal protection argument because Plaintiffs' objections are resolved on other grounds.

[15] KRS 121.170(5) also requires that permanent committees pay an administrative fee of $200 upon registration and a similar amount for each succeeding year until it terminates. These funds are transferred to the State Treasurer for deposit in the Election Campaign Fund. Plaintiffs have not argued that KRS 121.170(5) is unconstitutional.

Act, is a misnomer. In truth, the fee is a tax on political speech.

The Court will conduct a four part analysis: (1) does the tax burden speech; (2) does the state have a compelling interest; (3) is the tax necessary to advance that interest; and (4) is the tax narrowly tailored.

The Court's first concern is whether the provision burdens speech at all. If it does not, then the Court's inquiry necessarily ends. The burden here is that KRL PAC's ability to pay for political speech is reduced by the 5 percent tax. It must be admitted that this restriction has quite a bit less impact than the limitation on contributions which the PAC may receive and upon the amounts it may contribute to candidates. The 5 percent tax only slightly lessens the degree of permanent committee participation.[16] It has no impact upon individual contributions.

To be sure this provision is on the margins of what may be said to limit speech. But the limitation is real nonetheless. It is no different in kind than a tax on direct individual contributions or independent expenditures.

The Constitution tolerates no restriction on political speech, regardless of how small, unless that restriction advances a compelling state interest. Defendants say that

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[16] It would mean, for instance, that if KRLPAC raised $20,000, intending to help 40 candidates with a maximum $500 contribution, it would be limited to helping only 38 candidates or reducing its support to all 40 by $25 each. In the alternative, it could raise another $1,050 to insure that each of its candidates received the full $500.

the tax is part of the carefully calibrated legislative scheme to end political corruption in Kentucky. For that reason, they contend, it meets the test of advancing the concededly compelling interest. No doubt the ultimate objective is a compelling one. Can anyone say, however, that this tax is necessary to accomplish it?

Since its inception in 1994, KRS 121.180(6)(b) has generated slightly over $43,000 for transfer to the Election Campaign Fund. In 1995, that fund received $8,150,000 from the state's general fund and paid out slightly more than $5,900,000 to candidates. It is apparent that the 5 percent tax revenues play a negligible and non-essential role within the Act's legislative scheme. The question for the Court is whether a restraint on speech is justified because it is an element, though not as essential one, of an overarching legislative scheme that addresses a compelling state interest.

It is too plain to dispute that the relationship of this restraint to the ultimate end is attenuated and that its importance to the overall scheme is minimal. The 5 percent tax is neither the principal nor essential weapon in the scheme. Its benefits, if any, are ancillary and, to be honest, non-existent. The 5 percent tax does nothing to reduce the appearance of corruption, the likelihood of a quid pro quo or the unsavory influence of money in politics.

Even minor restrictions on political speech cannot be justified unless they are necessary to accomplish a compelling purpose. Can anyone fairly say that the limited revenues from this tax are necessary to combat corruption or to publicly finance elections? When a burden upon

speech is necessary to accomplish a compelling state interest, only then does the Supreme Court caution courts not to use a scalpel to probe within its reasonable limits. Where the burden on speech is not necessary to accomplish the state's interest, there is no reason for deference to the legislature's view. That the tax is both viewpoint and content neutral cannot rehabilitate this deficiency.

Where the First Amendment is concerned, the lines are sometimes drawn in strange places to secure a principle that is more important than any danger in the case at hand. This marginal restriction on political speech cannot stand strict scrutiny.

The Court will enter an Order consistent with this Memorandum Opinion.

/s/ John G. Heyburn II
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:95CV582-H

KENTUCKY RIGHT TO LIFE, et al. PLAINTIFFS

v.

NICHOLAS KING, et al. DEFENDANTS

ORDER

The Court has before it opposing motions for Preliminary Injunction and for Summary Judgment. Pursuant to Rule 65(a)(2), Fed.R.Civ.P., the parties agreed to advance the trial on the merits with a hearing on the injunction. The parties agreed to all material facts. Having reviewed the excellent briefs of counsel, having heard argument, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' claims for injunctive relief are DENIED, except that the Court declares that members of the Kentucky Registry of Election Finance are enjoined from enforcing the 5 percent administrative fee provision contained in KRS 121.180(6)(b).

This 2nd day of November, 1995.

/s/ John G. Heyburn II
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

/s/ KJ
cc: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:95CV582-H

KENTUCKY RIGHT TO LIFE, et al. PLAINTIFFS

v.

NICHOLAS KING, et al. DEFENDANTS

ORDER

There remains before the Court Plaintiffs' motion for class certification. Prior to the Court's ruling on the merits of this action, Plaintiffs requested certification of a defendant class, consisting of all Commonwealth Attorneys for the Commonwealth of Kentucky. Defendant Nicholas King was named as representative of the class through the verified complaint. Due to the Court's memorandum opinion in this matter, which disposed of the action on its merits, it is unnecessary to address the motion for class certification. Final disposition of the matter rendered the motion moot. The Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion for class certification is DENIED.

This is a final and appealable order.

This 8th day of November, 1995.

/s/ John G. Heyburn II
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

APPENDIX E

Case No: 95-6581

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Apr. 7, 1997)

KENTUCKY RIGHT TO LIFE, INC. et al;

Plaintiffs-Appellants

v.

COMMON CAUSE OF KENTUCKY;
LEAGUE OF WOMEN VOTERS OF KENTUCKY;

Amici Curiae

JOSEPH TERRY, et al;

Defendants-Appellees

BEFORE: Contie, Suhrheinrich, and Moore, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX F

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section One of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CHAPTER 121

CAMPAIGN FINANCE REGULATION

* * *

121.150. Campaign contribution and loan restrictions and expenditure limitations.

* * *

(6) No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than one thousand dollars ($1,000) from any person, permanent committee, or contributing organization in any one (1) election; except that no candidate for school board, his campaign committee, nor anyone acting on their behalf shall accept a contribution of more than one hundred dollars ($100) from any person or more than two hundred dollars ($200) from any permanent committee or contributing organization in any one (1) election. No person, permanent committee, or contributing organization shall contribute more than one thousand dollars ($1,000) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf, in any one (1) election; except that no person shall contribute more than one hundred dollars ($100) and no permanent committee or contributing organization shall contribute more than two hundred dollars ($200) to any one (1) school board candidate, his campaign committee, nor anyone acting on their behalf, in any one (1) election. Limits on contributions for slates of candidates for Governor and Lieutenant Governor which may be made or received in any one (1) election shall be governed by the provisions of KRS 121A.050.

* * *

(8) No permanent committee shall contribute funds to another permanent committee for the purpose of circumventing contribution limits of subsection (6) of this section.

(9) No person shall contribute funds to a permanent committee, political issues committee, or contributing organization for the purpose of circumventing the contribution limits of subsection (6) of this section.

(10) No person shall contribute more than one thousand five hundred dollars ($1,500) to all permanent committees and contributing organizations in any one (1) year.

(11) No person shall contribute more than two thousand five hundred dollars ($2,500) to the state executive committee of a political party and its subdivisions and affiliates in any one (1) year. Contributions a person makes to a political party in excess of one thousand dollars ($1,000) in any one (1) year shall be deposited in a separate account which the state executive committee maintains for the exclusive purpose of paying administrative costs incurred by the political party.

* * *

CHAPTER 121A

PUBLIC FINANCING CAMPAIGN ACT

121A.010. Definitions for chapter.

As used in this chapter, unless the context requires otherwise:

(1) "Registry" means the Kentucky Registry of Election Finance;

(2) "Fund" means the election campaign fund;

(3) "Transfer" means a transfer from the fund to a qualifying slate of candidates;

(4) "Qualifying contribution" means a contribution made to a slate of candidates for Governor and Lieutenant Governor by a natural person, permanent committee, executive committee of a political party, or contributing organization that is authorized to contribute to candidates that is paid by personal check, cashier's check, or money order. A qualifying contribution shall not include a cash contribution, loan, pledge, nonmonetary contribution, or contribution by a slate of candidates in excess of the contribution limits of KRS 121A.050;

(5) "Qualifying slate of candidates" means any slate of candidates of a political party or any independent nominees for Governor and Lieutenant Governor whose names are qualified to appear jointly on a primary or runoff primary election ballot, or candidates who have filed a notification and declaration pursuant to KRS 118.127 who are authorized by this chapter to receive contributions and make expenditures jointly for the regular election, and one (1) that has otherwise qualified under this chapter to receive a transfer from the election campaign fund, including having raised the minimum threshold qualifying amount. "Qualifying slate of candidates," when applied to a runoff primary, means a slate of candidates for Governor and Lieutenant Governor that has been certified by the Secretary of State as one that has received the highest or next highest number of votes for its party's nomination in a primary that filed a statement of intent to accept a transfer from the fund and abide by the expenditure limit for the primary which was not rescinded in a timely manner;

(6) "Slate of candidates" means any two (2) persons who have filed a joint notification and declaration pursuant to KRS 118.127, received contributions or made expenditures, appointed a campaign treasurer, designated a campaign depository, or given their consent for any other individual to receive contributions or make expenditures, with a view to bringing about their nomination for election to the offices of Governor and Lieutenant Governor. Unless the context requires otherwise, any provision of law that applies to a candidate shall also apply to a slate of candidates;

(7) "Candidate campaign account" means the bank account required by KRS 121.160 to be established, which for a slate of candidates for Governor and Lieutenant Governor shall be in a financial institution authorized to do business in Kentucky which is insured by the Federal Deposit Insurance Corporation and shall be for the sole purpose of receiving transfers from the fund and contributions or other moneys raised from personal resources;

(8) "Campaign expenditures" means lawful expenditures from a candidate campaign account on behalf of a slate of candidates to further its nomination or election to the offices of Governor and Lieutenant Governor authorized by the campaign committee treasurer or other authorized individual;

(9) "Committee" includes the following:

(a) "Campaign committee" which means one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific slate of candidates for nomination or election to the offices of Governor and Lieutenant Governor;

(b) "Political issues committee," which means three (3) or more persons joining together to advocate or oppose a constitutional amendment or public question which will appear on the ballot if that committee receives or expends money in excess of one thousand dollars ($1,000);

(c) "Permanent committee," which means a group of individuals, including an association, committee, or organization, other than a campaign committee or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose expressly advocating the election or defeat of one (1) or more clearly identified candidates, slates of candidates, or political parties and which functions on a regular basis throughout the year;

(d) An executive committee of a political party; and

(e) "Exploratory committee," which means a committee formed by one (1) or more persons which is registered pursuant to KRS 121.170 to accept contributions and make expenditures for the purpose of determining the feasibility of forming a slate of candidates for Governor and Lieutenant Governor or of determining the composition of a slate of candidates for Governor and Lieutenant Governor;

(10) "Contributing organization" means a group which merely contributes to candidates, campaign committees, or executive committees from time to time from funds derived solely from within the group, and which does not solicit or receive funds from sources outside the group itself. However, any contribution made by a contributing organization in

excess of one hundred dollars ($100) shall be reported to the registry;

(11) (a) "Contribution" means any:

1. Payment, distribution, loan, deposit, or gift of money or other thing of value, to a slate of candidates, its agent, a committee, or contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, slate of candidates, or other primary obligor. No individual shall become liable as surety, endorser, or guarantor for any sum which, when combined with all other contributions the individual makes to the slate of candidates, its agent, the committee, or the contributing organization, exceeds the contribution limits provided in KRS 121.150;

2. Payment by any individual other than the slate of candidates, its authorized treasurer, a committee, or contributing organization of compensation for the personal services of another individual which are rendered to a slate of candidates, committee, or contributing organization;

3. Goods, advertising, or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are furnished to a slate of candidates, committee, or contributing organization without charge, or at a rate which is less than the rate normally charged for such goods or services, if the

person furnishing the goods, advertising, or services paid another person for their provision; or

4. Payment by any individual other than the slate of candidates, its authorized treasurer, a committee, or contributing organization for any goods or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are utilized by a slate of candidates, committee, or contributing organization, if the person making the payment paid another person for their utilization.

(b) Notwithstanding the foregoing meanings of "contribution," it shall not be construed to include:

1. Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a slate of candidates, committee, or contributing organization;

2. Expenditures by an individual other than a candidate in connection with an event held in the individual's home when the individual expends less than three hundred dollars ($300);

3. A loan of money by any financial institution doing business in Kentucky made in accordance with applicable banking laws and regulations and in the ordinary course of business; or

4. An independent expenditure by any individual or permanent committee;

(12) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists; and

(13) "Independent expenditure" means the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them.

121A.030. Campaign expenditure limitations.

(1) A qualifying slate of candidates for Governor and Lieutenant Governor that receives transfers from the fund may make campaign expenditures which, in the aggregate, including the expenditure of transfers from the fund, shall not exceed one million eight hundred thousand dollars ($1,800,000) in connection with a primary election campaign and one million eight hundred thousand dollars ($1,800,000) in connection with a regular election campaign, subject to the provisions of KRS 121A.080(4) and (5), and three hundred thousand dollars ($300,000) in connection with a runoff primary campaign.

(2) The expenditure limit amounts established in subsection (1) of this section shall be increased or decreased in accordance with the consumer price index for all urban workers, and the registry shall make that adjustment in a year in which a Governor

and Lieutenant Governor are elected not later than the filing deadline for the primary election.

(3) No qualifying slate of candidates for Governor and Lieutenant Governor that receives a transfer from the fund or that is otherwise subject to expenditure limitations shall exceed the expenditure limitations of subsection (1) of this section through an additional reported or unreported expenditure by any person, committee, or contributing organization which does not qualify as an independent expenditure.

(4) A slate of candidates for Governor and Lieutenant Governor that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit that was not rescinded pursuant to KRS 121A.040(4) may receive contributions from permanent committees which, in the aggregate, shall not exceed twenty-five percent (25%) of the qualifying contributions received by the slate of candidates in any one (1) election. A slate of candidates that has filed a statement of intent to reject transfers from the fund and not abide by the maximum expenditure limit or one that has rescinded a statement of intent to accept transfers from the fund pursuant to KRS 121A.040(4) may receive contributions from permanent committees which, in the aggregate, shall not exceed twenty-five percent (25%) of the qualifying contributions received by the slate of candidates in any one (1) election up to a maximum of one hundred fifty thousand dollars ($150,000) in any one (1) election.

* * *

Supreme Court, U.S.
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No. 97-60

In The

Supreme Court of the United States

October Term, 1996

KENTUCKY RIGHT TO LIFE, INC., *et al.*,

Petitioners,

v.

DAVID STENGEL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Sixth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF KENTUCKY RIGHT TO LIFE, INC., *et al.*

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QUESTIONS PRESENTED

1. May a State impose a limit on the amount a person may contribute in the aggregate annually to multiple political action committees, in order to prevent evasion of the limit on the amount a person may contribute to a single candidate.

2. Is it reasonable to limit aggregate contributions to multiple political action committees, and not limit aggregate contributions to multiple candidates and multiple political parties, because there are real differences in the ability of contributors to misuse those entities as a conduit for circumventing the limit on the amount a person may contribute to a single candidate?

3. Must a State offer evidence of specific legislative findings of fact, supported by empirical proof, demonstrating the compelling nature of the harm sought to be addressed and the narrow tailoring of the means chosen to address that harm, where this Court has already held the interest is compelling and has already held such means are narrowly tailored?

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STATEMENT OF THE CASE

Petitioners ("KRL") brought an action against Respondents (the "Registry") for declaratory and injunctive relief, challenging as facially unconstitutional several of Kentucky's campaign finance reform laws.[1] The United States District Court for the Western District of Kentucky entered summary judgment, upholding the constitutionality of all but one statute. App. 34.[2]

KRL appealed, and the United States Court of Appeals for the Sixth Circuit affirmed the constitutionality of the challenged statutes. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), App. 1.[3]

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[1] For a complete listing of the challenged statutes, see the Petition at p. 3 n. 2.

[2] The District Court invalidated an administrative fee that was imposed only upon PACs. App. 50-53. The Registry did not appeal that decision.

[3] The District Court correctly held there was not a justiciable case or controversy as to several of Petitioners' claims because the Registry did not enforce the statutes in the manner hypothesized by Petitioners. The District Court therefore held certain of "Plaintiffs' claims are moot." App. 43. While the case was being briefed in the Sixth Circuit, the Kentucky General Assembly amended various portions of the Act, eliminating the bases of Petitioners' strained interpretations. The Court of Appeals, therefore, affirmed the judgment that the claims were moot. App. 1. Because both the District Court and the Court of Appeals found that those claims presented no justiciable case or controversy, KRL would not be precluded from litigating their constitutional claims in the unlikely event the Kentucky General Assembly re-enacted one or more of the pre-existing statutes which have now been repealed. Therefore, the question whether the trial court judgment should be affirmed or vacated does not present an issue that is even sufficiently arguably certworthy to merit further discussion.

In the Petition, KRL challenges only the statute which limits the amount a person may contribute in the aggregate to permanent committees ("PACs") to $1,500 per year. Ky. Rev. Stat. § 121.150(10) (hereinafter the "Aggregate PAC Limit").[4]

The Sixth Circuit recognized that PACs may be misused as a conduit for indirect contributions to candidates designed to circumvent Kentucky's $1,000 limit on contributions to candidates.[5] The Sixth Circuit therefore held that the aggregate limitation is narrowly tailored to advance Kentucky's compelling interest in preventing both the appearance and the actuality of corruption in Kentucky elections.[6]

The Sixth Circuit also recognized that the differing structures of PACs, political parties and candidate campaign committees permits those entities to be regulated differently to protect the integrity of the electoral process. The Sixth Circuit therefore held that imposing the aggregate limitation on contributions to PACs, but not on contributions to political parties or candidate campaign committees, is not a denial of equal protection.[7]

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[4] Aggregate limits on contributions by PACs to candidates are not at issue in this Petition since Petitioners have expressly declined to include in their Petition the judgment upholding § 121A.030(4), the Kentucky statute which limits PAC contributions to slates of candidates for governor and lieutenant governor to $150,000 in the aggregate per slate per election. App. 49-50.

[5] Ky. Rev. Stat. § 121.150(6) limits individual contributions to a candidate to $1,000 per election. Ky. Rev. Stat. § 121.150(11) similarly limits individual contributions to any one political party to $1,000 per year.

[6] 108 F.3d at 649, App. 27-28.

[7] 108 F.2d at 649, App. 27-28.

SUMMARY OF ARGUMENT

The questions presented by KRL's Petition have been clearly resolved by this Court, and the Sixth Circuit's decision is not in conflict with any decision of this Court or another Court of Appeals.

There is no ambiguity in this Court's precedents regarding the States' constitutional power to limit aggregate contributions to PACs as a corollary to limiting the size of contributions to candidates. That issue was firmly resolved by this Court in *Buckley v. Valeo*,[8] and reaffirmed in *California Medical Association v. Federal Election Commission*, ("*CMA*").[9] Those precedents make clear that the prevention of both the appearance and the actuality of corruption in the electoral process is a compelling State interest.[10] Those precedents also make clear that aggregate limits on PAC contributions make it more difficult to evade limits on contributions to candidates, and therefore are a narrowly tailored means of furthering the State's compelling interest in preventing both corruption and the appearance of corruption.[11]

Because Kentucky's Aggregate PAC Limit is consistent with these precedents, the Registry need not provide detailed empirical support for Kentucky's legislative finding that combating corruption and its appearance is a compelling State interest, and that the Aggregate PAC

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[8] 424 U.S. 1, 38 (1976).

[9] 453 U.S. 182, 197-199 (1981). In *CMA*, five Justices upheld the aggregate limit on contributions to PACs, 453 U.S. at 197-99, 203; and the dissenters would have dismissed for want of jurisdiction. *Id.*, 204-209.

[10] *Buckley*, 424 U.S. at 38; *CMA*, 453 U.S. at 197-199.

[11] 424 U.S. at 38; 453 U.S. at 197-199.

Limit is narrowly tailored to further that interest.[12] Where, as here, this Court has specifically identified the interest as compelling, and has specifically approved the prophylactic measure as narrowly tailored to advance that interest, the State is not required to present evidence to the District Court of a legislative finding redundant of this Court's precedents. The cases cited by KRL are therefore completely distinguishable.[13] Furthermore, even if Kentucky were required to submit such evidence, KRL waived this issue when it advised the District Court there was "no need for any testimony or anything in the record" and that the material facts were agreed to by the parties.[14]

Nor is there a split in the Circuits on this issue. *Carver v. Nixon* was limited to a question not previously decided by this Court, and it is therefore completely distinguishable.[15]

The Sixth Circuit's opinion is also consistent with this Court's precedents permitting political action committees to be regulated differently from political parties and candidate campaign committees without contravening the

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[12] *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 2378 (1995).

[13] *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

[14] Transcript of Preliminary Injunction Hearing, Supp. App. 4. *See also* App. 54; Argument IIA, *infra*.

[15] *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), involved the question whether a $300 limit on contributions to statewide candidates is unconstitutionally low. Furthermore, the Missouri limit was adopted by referendum, not by the legislature.

Equal Protection Clause.[16] Contrary to KRL's political rhetoric, Kentucky's Aggregate PAC Limit is not part of a nationwide "witch hunt" of PACs, and the Sixth Circuit's holding is not predicated upon the conclusion that PACs are "nefarious" or inherently corrupt.[17] Relying upon the opinion of the Court in *CMA*, which was reaffirmed by a unanimous Court in *Federal Election Commission v. National Right to Work Committee*,[18] the Sixth Circuit held that aggregate contribution limits may be imposed upon PACs, without being imposed upon political parties and candidate campaign committees, because there are real differences in the ability of contributors to misuse those entities to evade the limits on contributions to candidates[19]

There is no conflict among the circuits on this issue, either. In *Vote Choice v. DiStefano*,[20] the First Circuit merely found no legitimate reason for treating PACs, political parties and candidate campaign committees differently on the facts of that case, which were clearly distinguishable from the facts of this case.[21]

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[16] *California Medical Association, supra*, 453 U.S. at 201; *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 210-211 (1982).

[17] *See* Petition at 6-9, 13 and 25.

[18] 459 U.S. at 210.

[19] 108 F.3d at 649, App. 28-29.

[20] 4 F.3d 26 (1st Cir. 1993).

[21] In *Vote Choice*, Rhode Island had required PACs to report the "first dollar" in contributions, while the reporting threshold for parties and candidates was $100. The First Circuit could discern no basis for that disparate treatment. 4 F.3d at 33-36.

ARGUMENT

I. The Sixth Circuit followed this Court's precedents when it upheld the Aggregate PAC Limit.

A. This Court has squarely upheld aggregate limits on contributions to PACs.

In *Buckley v. Valeo,* this Court expressly upheld a $25,000 aggregate annual limit on contributions by individuals to all candidates, PACs and political parties. Holding that the aggregate limit survived strict scrutiny, this Court said:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity **serves to prevent evasion of the $1,000 contribution limitation** by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. **The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.**[22]

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[22] *Buckley*, 424 U.S. at 38-39 (emphasis supplied). KRL also claims throughout its brief that the Aggregate PAC Limit is more restrictive than the aggregate contribution limitations previously upheld by this Court because Petitioner Zoeller, who has already contributed $1500 to other PACs, is effectively prevented from making *any* contributions to KRLPAC. First, the Aggregate PAC Limit only limits the amount Zoeller can

In *CMA*, a majority of the Justices applied *Buckley's* holding to uphold an aggregate annual limit on contributions to multi-candidate PACs. A plurality of the *CMA* Court held:

> We also disagree with appellants' claim that the contribution restriction challenged here does not further the governmental interest in preventing the actual or apparent corruption of the political process. **Congress enacted § 441a(a)(1)(C) in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.** . . . If appellants' position – that Congress cannot prohibit individuals and unincorporated associations from making unlimited contributions to multicandidate political committees – is accepted, then . . . **these contribution limitations could be easily evaded."**[23]

While this portion of the *CMA* opinion was a plurality of four, Justice Blackmun concurred in the holding that aggregate limits on PAC contributions are constitutional. Justice Blackmun chose not to join the plurality opinion because he still disagreed with *Buckley's* "premise that the First Amendment test to be applied to contribution limitations is different from the test applicable to

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contribute in the aggregate to all PACs; the PACs to which he chooses to contribute the permissible amount *is his choice*. Second, *Buckley* upheld the aggregate contribution limit at issue there despite its express recognition that the aggregate limit posed "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Buckley*, 424 U.S. at 38.

[23] *CMA*, 453 U.S. at 197-198 (plurality opinion) (emphasis supplied).

expenditure limitations."[24] However, while he had dissented in *Buckley*, Justice Blackmun was "willing to accept as binding the Court's judgment in that case that the contribution limitations challenged there were constitutional."[25] Justice Blackmun, therefore, concurred in the plurality's judgment that *Buckley* controlled the question whether aggregate limits on contributions to PACs survived constitutional scrutiny, and he voted to uphold the aggregate limit as a narrowly tailored means of preventing corruption, saying:

> I conclude that contributions to multicandidate political committees may be limited to $5,000 per year **as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in** *Buckley*. The statute challenged here is thus analogous to the $25,000 limitation on total contributions in a given year that *Buckley* held to be constitutional. . . . By definition, a multicandidate political committee . . . makes contributions to . . . candidates for federal office. Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption.[26]

Accordingly, in *CMA*, five Justices upheld the aggregate limitation on contributions to PACs as a constitutional means of preventing evasion of limits on

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[24] *Id.* at 202 (Blackmun, J., concurring in part and concurring in the judgment).

[25] *Id.*

[26] *Id.* at 203.

contributions to candidates. Furthermore, the four dissenting Justices dissented on jurisdictional grounds without reaching the merits.[27] The Sixth Circuit's conclusion that Kentucky's Aggregate PAC Limit advances the State's compelling interest in preventing corruption and its appearance by preventing evasion of the limits on contributions to candidates is therefore consistent with this Court's precedents. KRL is simply wrong when it asserts that "the Sixth Circuit relied almost exclusively on *CMA* – particularly the plurality opinion – in fashioning its decision."[28] The Sixth Circuit relied upon the decisions in both *Buckley* and *CMA* upholding similar aggregate limitations. The Sixth Circuit held:

> the $1,500 aggregate limit furthers the Act's statutory scheme by preventing evasion of the $1,000 limit upon direct individual contributions to candidates. Absent this aggregate limit, unscrupulous individuals could pass unlimited amounts of cash to permanent committees with the understanding that those funds would be disbursed directly to specific candidates. *See Buckley*, 424 U.S. at 38 (noting possibility of evasion in upholding similar $25,000 limitation in the context of federal elections). In that sense, the limitation is integral to the effectiveness of the overall statutory scheme of combatting corruption in the political process. *See id. See also Calif. Med. Ass'n.*, 453 U.S. at 198-199.[29]

Despite the holdings in *Buckley* and *CMA*, KRL contends that a State may not limit contributions to committees, but may only limit contributions to candidates.[30] To

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[27] 453 U.S. at 204-209.

[28] Petition at 17.

[29] 108 F.3d at 649, App. 27.

[30] Petition at 9-10, 17-18.

support this proposition, KRL relies upon *Citizens Against Rent Control v. City of Berkeley*[31] and *Federal Election Commission v. National Conservative Political Action Committee*.[32] However, those decisions are completely distinguishable.

Citizens Against Rent Control involved limitations on contributions in a referendum on public issues.[33] *NCPAC* involved a limit on independent expenditures by PACs.[34] Accordingly, neither case supports KRL's contention that limitations may constitutionally be imposed only on contributions to candidates, but may not constitutionally be imposed upon contributions to committees which in turn contribute to candidates.

In sum, the Sixth Circuit's decision upholding Kentucky's Aggregate PAC Limit does not conflict with any prior decision of this Court. It is, in fact, amply supported by this Court's prior decisions.

B. The compelling state interest recognized by this Court fully supports the Sixth Circuit's finding that Kentucky's Aggregate PAC Limit is constitutional.

KRL contends that a State may not limit aggregate contributions to PACs because, they contend, this Court has only recognized a compelling interest in deterring

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[31] 454 U.S. 290 (1981).

[32] 470 U.S. 480 (1985) ("*NCPAC*").

[33] 454 U.S. at 296-299 ("Whatever may be the state interest . . . in . . . limiting contributions to . . . a candidate's committees there is no significant state or public interest in curtailing debate or discussion of a ballot measure").

[34] 470 U.S. at 495 ("Unlike *California Medical Assn.*, the present cases involve limitations on expenditures by PACs, not on the contributions they receive . . . ").

quid pro quo relationships which arise from large contributions directly to candidates.[35] This argument ignores not only the precise holdings in *Buckley* and *CMA*, but also this Court's repeated holding that the compelling interest supporting limits on contributions extends not only to preventing the actuality and appearance of quid pro quo corruption, but also to preventing erosion of the public's confidence in the integrity of the political process.

In *Buckley*, this Court agreed with the D.C. Circuit that Congress had a compelling interest not only in preventing particular contributors' undue influence over particular candidates, but also in alleviating the public's perception that elected officials were responding only to moneyed interests rather than the public interest. The *en banc* D.C. Circuit noted this interest had been recognized previously by this Court:

> The Constitution also takes account of the governmental interest in curbing the appearance of undue influence, in order to avoid the corrosion of public confidence that is indispensable to democratic survival. In *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973), Justice White articulated this: "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."[36]

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[35] Petition at 14-17.

[36] *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975) (en banc), *quoting*, *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565 (1973).

In *Buckley*, this Court also quoted *Civil Service Commission v. Letter Carriers*, explicitly reaffirming that the compelling interest includes preserving public confidence in the integrity of the process:

> To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . **Of almost equal concern** as the danger of actual quid pro quo arrangements **is the impact of the appearance of corruption stemming from public awareness** of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that **the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."**[37]

Accordingly, the compelling interests identified by the Court in *Buckley* included the interest in avoiding the public's perception that the political **process, itself**, was corrupt because the influence wielded by the special interests overwhelms the public's interest. The Court specifically recognized that public confidence is essential to any system of representative self-government.

This threat to the political process was again recognized by this Court in *Federal Election Commission v. National Right to Work*.[38] A unanimous Court emphasized that, in Buckley: "we specifically affirmed the importance of preventing **both** the actual corruption threatened by large financial contributions and **the eroding of public**

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[37] *Buckley*, 424 U.S. at 26-27, *quoting Civil Service Commission v. Letter Carriers*, supra, 413 U.S. at 565.

[38] 459 U.S. 197 (1982).

confidence in the electoral process through the appearance of corruption. These interests directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.' "[39] In *Federal Election Commission v. Massachusetts Citizens For Life*, this Court similarly acknowledged "the historical role of contributions in corruption of the electoral **process**."[40]

The compelling nature of the interest in protecting the integrity of the process was also reaffirmed in *Austin v. Michigan State Chamber of Commerce*, where this Court once again looked beyond the financial quid pro quo to recognize Michigan's compelling interest in resisting "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[41]

Similarly, this Court in *Federal Election Commission v. National Conservative Political Action Committee* ("*NCPAC*") defined corruption as "a subversion of the political process [whereby] [e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."[42] Most recently, a plurality of this Court identified the compelling governmental interest as

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[39] *Id.* at 208, *quoting, United States v. Automobile Workers*, 352 U.S. 567, 570 (1957).

[40] 479 U.S. 238, 260 (1986) (emphasis supplied).

[41] 494 U.S. 652, 660 (1990).

[42] 470 U.S. 480 at 496.

"assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption."[43]

Despite the consistent holdings of this Court, KRL asserts "this Court has held that . . . the only compelling interest for restricting political spending [is] preventing the *quid pro quo* corruption that may result from large individual contributions to candidates. . . . "[44] To support this assertion, KRL truncates the Chief Justice's opinion for the Court in *NCPAC*. However, that opinion actually said:

> We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption **or the appearance of corruption** are the only legitimate and compelling government interests thus far identified for restricting campaign finances.[45]

In his opinion for a unanimous Court in *National Right to Work*, the Chief Justice similarly wrote:

> Likewise, in *Buckley v. Valeo, supra*, we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions **and the eroding of public confidence in the electoral process** through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."[46]

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[43] *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309, 2313 (1996) (plurality opinion).

[44] Petition at 9.

[45] 470 U.S. at 496-97 (emphasis supplied).

[46] 459 U.S. at 208-09, quoting, *United States v. Automobile Workers*, supra, 252 U.S. at 570 (emphasis supplied).

In sum, the Sixth Circuit's decision that Kentucky's Aggregate Limit was narrowly tailored to advance Kentucky's compelling interest is completely consistent with a long line of decisions of this Court.[47]

C. The Sixth Circuit's determination that the Aggregate PAC Limit is narrowly tailored to Kentucky's compelling interests is consistent with this Court's precedents.

Consistent with this Court's precedents, the Sixth Circuit also found that Kentucky's Aggregate PAC Limit is narrowly tailored to advance Kentucky's compelling interest in preventing corruption and its appearance. KRL contends, however, that the Aggregate PAC Limit is not sufficiently narrowly tailored because "Kentucky already forbids both individuals and PACs from circumventing the contributions [sic] limits to candidates: Ky. Rev. Stat. Ann. § 121.150(8) prohibits PACs from 'earmarking' contributions to evade the $1,000 limit, and Ky. Rev. Stat. Ann. § 121.150(9) similarly prohibits individuals from evading it."[48] However, KRL did not argue this issue before either the District Court or the Sixth Circuit.[49]

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[47] Thus, KRL's quotation of this Court's decision in *NCPAC* does not, as KRL alleges, call into question the CMA rationale. *See* Petition at 15, quoting *Federal Election Commission v. National Conservative Political Action Committee, supra*, 470 U.S. at 495. Rather, that quote evidences *NCPAC*'s determination that the "speech by proxy" rationale did not apply to independent expenditures by a PAC.

[48] Petition at 21.

[49] *See* KRL's Memorandum in Support of Motion of Preliminary Injunction at 49-51 and Brief of the Appellants at 42-43, wherein KRL argues only that the statute is not narrowly tailored because the **amount** of the limit on contributions to PACs is too low.

Because KRL raises the issue for the first time in its Petition, it is not properly before this Court.

As this Court stated in *Singleton v. Wulff*:[50]

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed.1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Furthermore, this Court rejected a similar argument in *Buckley*. In that case, it was contended that preventing *quid pro quo* arrangements was the State's only compelling interest, and that anti-bribery statutes and disclosure requirements were therefore the maximum governmental regulation constitutionally allowable.[51] This Court rejected that contention, however, and squarely held the States' compelling interests are not limited to "only the most blatant and specific attempts of those with money to influence governmental action."[52] Instead, the Court held

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[50] 428 U.S. 106, 120 (1976).

[51] *Buckley*, 424 U.S. at 27-28.

[52] *Id.* at 28.

the compelling interests include restoring "confidence in the system of representative Government."[53] The Court, therefore, held that the individual and aggregate contribution limits at issue there were sufficiently narrowly tailored to survive strict scrutiny.[54]

Indeed, in *Buckley*, this Court upheld an aggregate annual limit even broader than Kentucky's Aggregate PAC Limit. The statute upheld in *Buckley* imposed a $25,000 annual limit on individual contributions to **all** candidates, PACs and political parties, a limit more restrictive of political contributions than Kentucky's aggregate annual limit on contributions to PACs alone. This Court reasoned that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of **unearmarked** contributions to political committees likely to contribute to that candidate . . . "[55] Accordingly, the mere fact that Kentucky expressly prohibits "earmarking" contributions

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[53] *Id.* at 27 *quoting, Civil Service Commission v. Letter Carriers, supra,* 413 U.S. at 565. *Accord CMA,* 453 U.S. at 199 n. 20.

[54] Last term, a plurality of this Court said that where evasion of individual contribution limits was the harm sought to be prevented, a limitation on contributions to the conduit entity was an appropriately narrowly tailored response. *Colorado Republican Campaign Committee v. Federal Election Commission, supra,* 116 S.Ct. at 2316. "We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits were a serious matter, might decide to change the statute's limitations on contributions to political parties. *Cf. California Medical Assn.,* 453 U.S., at 197-199 (plurality opinion) (danger of evasion of limits on contribution to candidates justified prophylactic limitation on contributions to PAC's)."

[55] 424 U.S. at 38-39.

to PACs does not preclude the conclusion that the Aggregate PAC Limit is not overbroad, but is a narrowly tailored prophylactic remedy which deters evasion of the limitations on contributions to candidates.

II. The Registry need not offer evidence of specific legislative findings, supported by empirical proof, for the District Court to determine the Aggregate PAC Limit is narrowly tailored to advance a compelling state interest.

A. Because KRL advised the District Court that there was no need for testimony or other proof to be entered into the record, KRL cannot now argue that the Registry's failure to offer evidence of legislative findings or other proof warrants a judgment in KRL's favor.

KRL contends the Sixth Circuit decision is unsupported because the Registry failed to offer evidence that the Kentucky legislature made specific findings concerning the compelling interest being advanced and the narrow tailoring of the Aggregate PAC Limit.[56] However, KRL waived that argument when it advised the District Court that there was "no need for any testimony or anything in the record" and that the material facts were agreed to by the parties.[57] In the District Court, KRL had moved for a preliminary injunction and the Registry had moved for summary judgment. After both motions were fully briefed, the District Court heard the oral argument of counsel. At that proceeding, the District Court *sua sponte* suggested that the motion for preliminary injunction be consolidated with the hearing on the merits. The

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[56] Petition at 23-25.

[57] Transcript of Preliminary Injunction Hearing at 4, Supp. App. at 2. *See also* App. 54.

District Court, therefore, specifically asked the parties whether there was any "need for any testimony or anything in the record" and whether "the facts, although they have not been stipulated, are agreed to by everyone."[58] KRL agreed that there was no need for any evidence to be presented by either side,[59] and consented to consolidating the preliminary injunction with the hearing on the merits.[60] KRL, therefore, waived its argument that the Registry has the burden of proving legislative findings demonstrating that the Kentucky legislature specifically determined that the Aggregate PAC Limit is narrowly tailored to advance an interest that is compelling.

B. The State is not required to offer evidence of specific legislative findings of fact, supported by empirical proof, demonstrating the compelling nature of the harm sought to be addressed and the narrow tailoring of the means used to address the harm, where this Court has already held the interest is compelling and the means are narrowly tailored.

Because Kentucky's Aggregate PAC Limit is consistent with Supreme Court precedent, the Registry need not provide evidence of specific legislative findings that combating corruption and its appearance is a compelling state interest or that the statute is a narrowly tailored means of furthering that interest. As this Court recently stated in *Went For It*:

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[58] Transcript of Preliminary Injunction Hearing at 4, Supp. App. at 2.

[59] See footnote 57, supra.

[60] Transcript of Preliminary Injunction Hearing at 3, Supp. App. at 1. *See also* App. 54.

> In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."[61]

In this case, the harm predicted by the Kentucky legislature is the perception of corruption from contributions exceeding the limits enacted in Kentucky, a harm already recognized as real by this Court. Indeed, this Court's recognition of the potential for corruption of the political process inherent in campaign finance, and the acceptability of contribution limits as a means of combating that corruption, have been taken as a given in every campaign finance case decided by this Court since *Buckley*.[62] For example, in *NCPAC*, this Court recognized that

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[61] *Went For It*, 515 U.S. 618, 115 S.Ct. at 2378, quoting, *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 1857-1858, 119 L.Ed.2d 5 (1992).

[62] *See* cases cited at Argument I.B., *supra*. Moreover, the need for Kentucky's campaign finance legislation is supported by the history of corrupt politics in Kentucky. The legislative framework regulating campaign finance was enacted in the wake of an FBI sting operation in which public officials had been sentenced to prison for selling their influence for as little as $400. Miller, Kentucky Politics and Government, 197-215 (Univ. Nebraska Press 1994). As the District Court noted "No one with a working knowledge of our recent political history can doubt that some limitation on contributions will contribute directly to reducing the perception of political corruption in Kentucky. . . . Who should know better than the legislature what might wash the appearance of corruption from our politics?" App. 45.

it is "proper [to] defer[ ] to a congressional determination of the need for a prophylactic rule where the evil of political corruption ha[s] long been recognized. . . . "

Not only has the compelling interest in preventing corruption been firmly established by this Court, the use of aggregate limits on contributions to PACs to prevent evasion of limits on contributions to candidates has twice been upheld by this Court. *Buckley* clearly held that aggregate contribution limits prevent evasion of candidate contribution limits and, therefore, are narrowly tailored to further the compelling interest in preventing the actuality and appearance of corruption. *CMA* applied *Buckley* and upheld aggregate limits on contributions to PACs. Clearly, the Kentucky legislature may rely upon these holdings without the formality of legislative findings that deterring corruption is a compelling interest and that aggregate PAC limits are not overbroad. Clearly, the District Court may rely upon these holdings without requiring the Registry to offer into evidence legislative history proving the Kentucky legislature made findings of fact that the particular remedy chosen was narrowly tailored, not overbroad.

KRL relies upon *Turner Broadcasting*[63] and *National Treasury Employees Union*,[64] but those cases are inapposite. In *Turner Broadcasting* this Court was evaluating, for the first time, the Government's proffered rationale for the cablecasting "must carry" rules, to wit: that the broadcast industry is jeopardized by the growth of cable. The Court recognized that, in order to make sound predictions in this economic arena, Congress had to "amass and evaluate the vast amounts of data . . . bearing upon . . . [a]

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[63] *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994).

[64] *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

complex and dynamic" issue.[65] It was in that context that the Court stated that the harm sought to be addressed must be real, not imagined. This Court held that Congress cannot merely say broadcasting is jeopardized; the Court must be persuaded it is factually true, and that the "must carry" rules would alleviate those harms in the way Congress predicted. Moreover, this Court also stated in *Turner Broadcasting* that "courts must accord substantial deference to the predictive judgments of Congress. Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. . . . And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.[66]

National Treasury Employees Union is similarly inapposite. In *United Public Workers v. Mitchell*[67] and *Civil Service Commission v. Letter Carriers*,[68] this Court expressed its approval of the Hatch Act, which prohibits partisan political activity by federal employees. However, in *National Treasury Employees Union*, the Court was reviewing Congress' attempt to greatly expand the Act to prohibit the receipt of honoraria by rank and file civil service workers, an issue never previously considered by the Court. The Court held that Congress could reasonably expand the holding in *Letter Carriers* to prohibit the acceptance of honoraria by high ranking officials, but could not assume the *Letter Carriers* rationale applied equally to "an immense class of workers with negligible

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[65] *Turner Broadcasting System, Inc.*, 512 U.S. at 665-666.

[66] *Id.* at 665.

[67] 330 U.S. 75 (1947).

[68] 413 U.S. 548 (1973).

power to confer favors on those who might pay to hear them speak or to read their articles."[69] The Court concluded that the lack of any evidence that the danger recognized in *Letter Carriers* was likely to result from rank and file employees receiving honoraria rendered the statute unconstitutional.[70]

In contrast, this Court has expressly recognized both the compelling interest the Kentucky statute is designed to serve and the narrowness of the remedy Kentucky has chosen. Accordingly, the Kentucky legislature was not obligated to make detailed legislative findings to enact the Aggregate PAC Limit.

C. The Sixth Circuit decision is not in conflict with *Carver v. Nixon*.

The Sixth Circuit decision is not in conflict with the Eighth Circuit's decision in *Carver v. Nixon*[71] because that court's opinion was limited to the narrow question whether a particular contribution limit adopted by referendum was too low. In that case, a Missouri referendum reduced candidate contribution limits to $300 in statewide races. The issue in *Carver* was whether this reduction constituted the difference in kind, not just degree, which *Buckley* requires to hold a contribution limit to be unconstitutionally low.[72] *Carver* addressed the absence of any findings supporting the Missouri electorate's decision that a limit so low was necessary. That issue is very different from the Sixth Circuit's application of this Court's precedent that aggregate limits on contributions

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[69] *National Treasury Employees Union*, 513 U.S. at 473.

[70] *Id.*

[71] *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995).

[72] *Id.* at 644.

to PACs validly deter evasion of constitutional contribution limits.

Moreover, *Carver* involved a referendum, not legislation enacted by a deliberative process. The Eighth Circuit therefore expressly declined to decide "[w]hether the deference *Turner Broadcasting System* requires for acts of Congress extends to the acts of the state legislative body" because, the court stated, that "is an issue not before us to decide."[73] Indeed, the Eighth Circuit's subsequent decision in *Rosenstiel v. Rodriguez*,[74] demonstrates that *Carver* was limited to its facts.

In *Rosenstiel*, the Eighth Circuit required no evidence of legislative findings that either the system of public financing at issue there was supported by Minnesota's compelling interests in preventing corruption or that the statutory scheme was narrowly tailored to that end. Rather, the *Rosenstiel* court, like the Sixth Circuit, relied upon Supreme Court precedent and the reasonable predictions of the state's legislative body to determine that the statutes were constitutional:

> In this case, the State seeks to promote a reduction in the possibility for corruption that may arise from large campaign contributions and a diminution in the time candidates spend raising campaign contributions thereby increasing the time available for discussion of the issues and campaigning. . . . Indeed, given the importance of these interests, the State has a compelling interest in stimulating candidate participation in its public financing scheme. . . . Thus, the constitutional validity of the State's scheme turns on whether the challenged provisions are narrowly tailored to serve these interests. We believe that

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[73] *Id.*

[74] 101 F.3d 1544 (8th Cir. 1996).

> each of the challenged provisions satisfies this test. Initially we observe that the State's basic public financing program of providing a public subsidy in exchange for the candidate's agreement to abide by expenditure limits is consistent with campaign financing plans which courts have long held satisfy strict scrutiny. . . . The expenditure limitation waiver also satisfies strict scrutiny. As we noted above, this provision removes the disincentive a candidate may have to participate in the public financing system because of the candidate's fear of being grossly outspent by a well-financed, privately funded opponent. Absent such a safeguard, the State could reasonably believe that far fewer candidates would enroll in its campaign financing program. . . . We likewise conclude that the contribution refund is narrowly tailored to serve the State's interests. . . . The State reasonably could conclude that this additional form of public subsidy will encourage candidate participation.[75]

Carver did not reach the issue that was before the Sixth Circuit in this case and, as *Rosenstiel* clearly demonstrates, the Eighth Circuit's standard of review of campaign finance regulations is simply not in conflict with the decision of the Sixth Circuit.

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[75] 101 F.3d at 1553-1554.

III. Kentucky's Aggregate PAC Limit does not deny KRL equal protection of the laws.

A. Because the Aggregate PAC Limit is designed to prevent evasion of the limit on the amount individuals may contribute to candidates, it is narrowly tailored to that end and is not discriminatory.

KRL contends that the Aggregate PAC Limit impermissibly discriminates against PACs because there is no similar limit on the amount that individuals may contribute to multiple candidates or to multiple political parties. That argument ignores the fact that the Aggregate PAC Limit is designed to deter circumvention of the $1,000 limit on contributions to a single candidate. An aggregate limit on contributions to several different candidates obviously would not serve that purpose. Similarly, Kentucky limits contributions to a political party to $1,000, but does not impose an aggregate limit on contributions to multiple political parties. However, Kentucky does not permit fusion tickets,[76] so contributions to several different political parties could not evade the $1,000 limit on a person's contribution to a single candidate. Accordingly, there clearly is a reasonable basis for treating PACs differently from parties and candidates in the context of aggregate annual contribution limits.

As the Sixth Circuit held, Kentucky's Aggregate PAC Limit regulates PACs differently because of their ability to serve as conduits for evading limits on contributions to candidates. In contrast, there is no correlative reason to limit the number of candidates or parties to whom an individual or organization can contribute, since those

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[76] *See Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997).

contributions do not risk evading the limit on contributions to individual candidates.

Moreover, Kentucky's Aggregate PAC Limit is less restrictive of expression and association than KRL's suggested aggregate contribution limit applicable to all PACs, candidates and political parties. Kentucky's Aggregate PAC Limit allows individuals to contribute to an unlimited number of candidates for political office and to an unlimited number of political parties, and to make unlimited independent expenditures. The statute is therefore not unconstitutionally discriminatory, but narrowly tailored to accomplish its purpose.

B. The Sixth Circuit followed this Court's precedent when it held that PACs could be treated differently because of their different structure.

The opinion for the Court in *CMA* held that different types of political entities can be regulated differently, recognizing the differing structures of those entities and the differing political purposes they serve:

> The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.[77]

KRL concedes this holding was an opinion of the Court, not a plurality opinion.[78] The unanimous Court in *Federal Election Commission v. National Right to Work Committee* reaffirmed this holding:

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[77] *California Medical Association*, 453 U.S. at 201.

[78] Petition at 6.

> **As we said in California Medical Assn. v. Federal Election Commission, the "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process."** . . . The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals.[79]

Despite KRL's attempt to convince this Court that the Sixth Circuit "implicitly" held PACs were inherently corrupt or "nefarious,"[80] the Sixth Circuit merely held that PACs may be treated differently from political parties and candidate campaign committees because PACs are different from parties and candidates in this context. The Sixth Circuit held:

> The disparate treatment under Kentucky's Campaign Finance Law reflects [a] . . . legislative determination that aggregate limitations are necessary to prevent manipulation of permanent committees in order to evade the Act's $1,000

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[79] *National Right to Work Committee*, 459 U.S. at 210-211, *quoting California Medical Association*, 453 U.S. at 201.

[80] KRL describes Kentucky's aggregate limit on contributions to PACs as part of what it describes as a universal trend to "get PACs." Petition at 7-9. Neither the legislature nor the Sixth Circuit relied upon the premises set forth in KRL's brief in determining that it was necessary to limit an individual's aggregate contributions to PACs in order to prevent circumvention of the limits on the amount of contributions from individuals to candidates and KRL's claims in this regard are wild suppositions.

> limitation on direct contributions to any one political candidate.[81]

Thus, the Sixth Circuit followed this Court's precedents in determining that KRL had not been denied equal protection of the law.

C. There is no conflict among the circuits on this issue.

KRL claims that the Sixth Circuit's opinion conflicts with the First Circuit's decision in *Vote Choice v. DiStefano*.[82] However, *Vote Choice* does not stand for the proposition that PACs can never be regulated differently than parties or candidates. Rather, *Vote Choice* merely stated that there must be a reason for treating PACs differently and found, that on the facts before it, there was no legitimate reason for treating them differently.[83]

In *Vote Choice*, the First Circuit considered a facial challenge to a statute that mandated "first dollar disclosure" for PACs, meaning that every amount contributed to a PAC had to be disclosed. The Court contrasted this with the $100 reporting threshold applicable to candidate campaign committees. The First Circuit held there was no basis for this disparate treatment of PACs.[84]

In contrast, it is entirely reasonable to conclude that individuals could circumvent Kentucky's $1,000 limit on contributions to candidates by contributing $1,000 to unlimited numbers of PACs with the intention that those contributions be passed on to their favored candidate. It is equally reasonable to conclude that contributions to

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[81] 108 F.3d at 649, App. 29.

[82] *Vote Choice v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). *See* Petition at 26-28.

[83] *Vote Choice v. DiStefano*, 4 F.3d at 35.

[84] *Id.*

several different candidates or several different parties will not evade the limit on a contribution to a single candidate. It is therefore reasonable to limit aggregate contributions to PACs without limiting aggregate contributions to multiple parties or multiple candidates. Thus, *Vote Choice* is simply distinguishable. There is no split in circuits.

CONCLUSION

Because the Sixth Circuit followed this Court's precedents and because there is no conflict between the Sixth Circuit's decision and the decisions of other courts of appeals, Respondents respectfully request that this Court deny KRL's petition.

Respectfully submitted,

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Dated: August 7, 1997

SUPPLEMENTAL APPENDIX

Transcript of Preliminary Injunction Hearing

* * *

[p. 3] THE CLERK: Case number 3:95-CV-00582. Kentucky Right to Life, Incorporated, et al. versus Nicholas King, et al.

THE COURT: Good afternoon, everyone. All right. We are here on motions for preliminary injunction, which I understand there's – basically we are in a position to decide the case on summary judgment or permanent injunction, whichever the case may be.

MR. BOPP: I believe we are, Your Honor, with one request. We obtained their motion for summary judgment and motions to dismiss yesterday by fax, and they were kind enough to do that to accommodate us. We would like to have an opportunity to respond to their submissions, and in that event we would request the court to consider issuing a temporary restraining order or preliminary injunction allowing us time to respond.

THE COURT: Okay. Well, I think what we will do is we will have our discussion here today, see what the issues are, and to the extent there needs to be a response by anyone, it can be of a narrowly focused nature, as they say.

MR. BOPP: Appreciate that, Your Honor.

THE COURT: Okay. I think, first of all, perhaps it would be well to determine what the issues are that we are going to discuss, and I think perhaps it would be best for the plaintiffs to tell me, first of all, what you believe

the [p. 4] issues are, see if we can agree on that, and then I'll give each of you an opportunity to talk about what you think is most important and I'll probably have some questions, if you all think that's an appropriate way to go.

MR. SNYDER: I think that makes sense, Your Honor.

THE COURT: I gather there's no need for any testimony or anything in the record that either – it seems as though the facts, although they have not been stipulated, are agreed to by everyone.

MR. BOPP: That's our understanding, Your Honor.

MR. SNYDER: I think that's correct, Your Honor. The only factual issue – only thing that could be a factual issue that I am aware of is their pleading that Kentucky Right to Life, Inc. accepts only minimal contributions from for-profit corporations. We are willing to accept that at face value rather than probing it by discovery for purposes of what amounts to declaratory relief on the theory that if that becomes untrue in the future, there's always enforcement action related to that. For purposes of the relief they seek, we will stipulate that fact to be true as of this proceeding.

THE COURT: Okay. Maybe you could first then take a shot at what the issues are.

MR. BOPP: Thank you, Your Honor. Your Honor, my name is Jim Bopp. I'm attorney for the plaintiffs. Also

* * *

[p. 83] enlightening and very clear. I appreciate that on both sides.

MR. BOPP: Thank you very much.

THE COURT: Thank you.

(End of proceedings.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ Alan W. Wernecke — 1-11-96

ALAN W. WERNECKE, RMR — DATE

Official Court Reporter

No. 97-60

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SEP 10 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

KENTUCKY RIGHT TO LIFE, INC.; KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE; ROBERT ZOELLER; and LORA ROBERTSON, Treasurer of Kentucky Right To Life Political Action Committee,

v. *Petitioners,*

DAVID STENGEL, as Commonwealth's Attorney for Jefferson County, Kentucky, and as a representative of the class of Commonwealth's Attorneys in the State of Kentucky; A.B. CHANDLER, II, as Attorney General of the State of Kentucky; JOSEPH H. TERRY, as Chairman of the Registry of Election Finance of the State of Kentucky; CAROLINE S. BRATT, as a member of the Registry of Election Finance; VICTOR B. MADDOX, as a member of the Registry of Election Finance; GEOFFREY C. RALSTON, as a member of the Registry of Election Finance; WILLIAM T. WARNER, as a member of the Registry of Election Finance; BRENDA W. WILLOUGHBY, as a member of the Registry of Election Finance; and BETTY JOE WINTERS, as a member of the Registry of Election Finance, all in their official capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF KENTUCKY RIGHT TO LIFE, INC., KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE, ROBERT ZOELLER AND LORA ROBERTSON

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INTRODUCTION

This Court has never held that political action committees (hereafter "PACs") are so inherently corrupting that the State may single them out for adverse treatment and thereby effectively prohibit people from associating with them and with each other (let alone that it may do so without any evidence or legislative findings to support such treatment). The Respondents, however, (hereafter "Kentucky") strain to convince this Court that it has approved of such disparate treatment. Kentucky hangs its hat on *California Medical Ass'n v. Federal Election Commission*, 435 U.S. 182 (1981) (*CMA*), and *Buckley v. Valeo*, 424 U.S. 1 (1976). However, neither of these cases involved, much less approved of, an *aggregate* contribution limit *only for* PACs. *CMA* upheld a limit on contributions to a *single*, multicandidate PAC, while *Buckley* upheld an aggregate limit on *total* contributions.

Although this Court has never addressed this issue, Kentucky insists there is no need for it to do so because the analysis, if not the holdings, of these decisions support treating PACs differently to advance a prophylactic interest in preventing corruption. According to Kentucky, this Court's decisions also allow it to treat PACs this way without *any* evidence that doing so is necessary, due to their unique structures and purposes, whatever these unique structures and purposes might be (for Kentucky still is unable to say). The Petitioners (hereafter "KRL") will show that *CMA* and *Buckley* do not affirmatively answer the question of whether Kentucky may so discriminate against PACs. Further, *Federal Election Committee v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (*NCPAC*), and *Citizens Against Rent Control v. City Of Berkeley*, 454 U.S. 290 (1981), seem to answer this query negatively. Nevertheless, because *CMA* and *Buckley could* be read to stand for such a proposition (and the Sixth Circuit has in fact so read them), this Court should grant the petition to remove the tension between these decisions and *NCPAC* and *Citizens Against Rent Control*.

ARGUMENT

I. This Court Has Never Addressed Whether A State May Limit Aggregate Contributions Only To PACs, And Its Conflicting Decisions In This Area Raise The Question Of Whether It Is Constitutional To Do So.

Kentucky asserts that in upholding Ky. Rev. Stat. § 121.150(10), the Sixth Circuit followed *Buckley*. *Opposition* at 6. But *Buckley* upheld a $25,000 aggregate limit on *all* contributions on the grounds that a limit *of this magnitude* was "a quite modest restraint upon protected political activity." 424 U.S. at 38-39. A $1,500 aggregate limit only on PAC contributions, though, is *not* a "quite modest restraint on protected political activity."

Because Kentucky does not expressly limit individual contributions to PACs, the aggregate PAC contribution limit functions as the limit on individual contributions to PACs. *See* Ky. Rev. Stat. § 121.150(10). As a result, a person can make the maximum individual contribution of $1,500 to only one PAC. Thus, while Kentucky rather callously notes that the statute enables a person to contribute to the PACs of "his choice," *Opposition* at 7, n.22, this, in reality, is not much of a choice[1]: $1,500 is not a massive amount of money; indeed, in 1976 ("*Buckley*") dollars, it is only equal to $559.60. *Buckley* upheld a $25,000 – not a $559.50 – aggregate contribution limit.

Kentucky might complain that it is inappropriate to compare a limit on all contributions with a limit only on PAC contributions. This, however, raises another question: what is so *uniquely bad* about PACs that warrants singling them out for such adverse treatment? In addressing KRL's equal protection claim, Kentucky notes that the Court has approved of treating groups differently based upon their structures and purposes (it does not address KRL's associational claim on this basis).[2]

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[1] That the $1,500 aggregate contribution limit does not provide a meaningful choice indicates that it was not established by legislative findings or other evidence (*infra*).

[2] In its *equal protection section*, Kentucky argues that *Vote Choice v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), does not conflict with the Sixth

Opposition at 27-28. And it asserts that Ky. Rev. Stat. § 121.150(10) is needed to prevent circumvention of its $1,000 contribution limit. *See* Ky. Rev. Stat. § 121.150(6). *Id.* at 28, n.80. But it is still unable to say *why* the structures and purposes of PACs are much more problematic than those of other groups.[3]

Kentucky argues that *CMA* supports singling-out PACs for such disparate treatment. *Id.* at 7. *CMA*, though, is inapposite for two reasons. First, it involved contribution limits to a *single* PAC, while Ky. Rev. Stat. § 121.150(10) limits *total* PAC contributions. There is no evidence or legislative findings that PACs are more corrupting than other groups and individuals,

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Circuit's decision because it is reasonable to conclude that PACs, but not candidates and political parties, could be used to evade its $1,000 contribution limit. *Opposition* at 29-30. *Vote Choice*, however, was premised on associational grounds. For the same reason that KRL may not be treated differently for purposes of equal protection, it may not be treated differently for purposes of freedom of association: such disparate treatment "does not serve the state's interest in combatting corruption because corruption can as easily spring from . . . contributions [that flow through candidates and political parties] as from contributions that flow through PACs." *Vote Choice*, 4 F.3d at 35; *see* note 3, *infra*. Because there is no reason to target PACs for adverse treatment, the Sixth Circuit's decision conflicts with *Vote Choice*. The Court should grant the petition to resolve this conflict.

[3] Kentucky argues that because Ky. Rev. Stat. § 121.150(10) "is designed to deter circumvention of the $1,000 limit on contributions to a single candidate," it makes no sense to have comparable restrictions for candidates and political parties, who, according to it, cannot "serve as conduits for evading limits on contributions to candidates." *Opposition* at 26. This is simply incorrect. A person could, for example, contribute $1,000 to Candidate X and Candidate Y, and then direct Candidate Y to transfer its $1,000 contribution to Candidate X, i.e., a candidate transfer. A person could just as easily contribute $1,000 to Candidate X and Political Party Y, and then direct Party Y to give its $1,000 contribution to Candidate X. In both cases, the $1,000 limit has been easily circumvented. The question remains then, what, *if anything*, is so unique about PACs that warrants targeting them, and only them, for such adverse treatment, and not, for example, candidates, political parties, and other groups.

thus warranting such severe regulation. Indeed, this Court has noted just the opposite: PACs are "designed expressly to participate in political debate [and] . . . are [thus] quite different from the traditional corporations organized for corporate gain." *NCPAC*, 470 U.S. at 500. To borrow from *NCPAC*:

> [e]ven were we to determine that the large pooling of financial resources by [a single PAC] did pose a potential for corruption or [its] appearance . . . [Ky. Rev. Stat. § 121.150(10)] is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to [PACs] that [are trying to] solicit [a few hundred dollars]. . . .

Id. at 498.

Second, and more importantly, Kentucky has prohibited Mr. Zoeller from making *any* contributions to KRLPAC simply because he has contributed a total of $1,500 to other PACs. *CMA* does not stand for such a proposition; it does not support the "wholesale restriction of clearly protected conduct." *Id.* at 501. Indeed, "[t]he plurality in *CMA* emphasized in that case, however, that nothing in the statutory provision in question 'limits the amount an unincorporated association or any of its members may independently expend in order to advocate political views,' *but only the* ***amount*** it may contribute *to a [PAC]*." *Id.* at 494 (emphasis added) (quoting *CMA*, 453 U.S. at 195). While Ky. Rev. Stat. § 121.150(10) leaves Mr. Zoeller free to make independent expenditures, it is much more restrictive than the statute *CMA* upheld in that it drastically limits the groups with which he may associate.[4] The Court should grant

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[4] In *NCPAC*, this Court, for the third time, recognized that the *only* compelling interests for restricting campaign finances is preventing actual and apparent corruption that exists from large individual contributions to current and potential officeholders: "[w]e held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-497 (quoted by KRL, in full, Petition at 15). Kentucky, though, asserts there is a

the petition to determine whether a prophylactic interest in preventing corruption warrants so dramatically limiting the avenues of political expression and association.

Kentucky also argues that the Sixth Circuit followed *Buckley* in finding that Ky. Rev. Stat. § 121.150(10) is narrowly tailored to prevent circumvention of the $1,000 individual contribution limit. *Opposition* at 16-18. However, for the same reasons that the statute is not a "quite modest restraint" on protected political speech and association (*supra*), it is not narrowly tailored as a prophylactic measure. Moreover, this Court's more recent decisions indicate that wide prophylactic bans are not narrowly tailored, particularly when more precise measures are readily available.

Five years after *Buckley*, in *Citizens Against Rent Control*, this Court rejected the city's argument that a $250 contribution limit to PACs was needed as a prophylactic measure "to make known the identities of supporters and opponents of ballot measures," 454 U.S. at 298, because the city *directly* required contributors to committees to identify themselves. *Id.* In this regard, ten years after *Buckley*, in *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 265 (1986) (*MCFL*), the Court stated that "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."

Twenty years after *Buckley*, in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309, 2328 (1996) (Thomas J., concurring in the judgment and dissenting in part), Justice Thomas, applying this rule from *MCFL*, discussed why contribution limits are not

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third – and more amorphous – compelling interest for restricting campaign finances: "preventing erosion of the public's confidence in the integrity of the political process." *Opposition* at 11. It then *concludes* that Ky. Rev. Stat. § 121.150(10) is narrowly tailored to advance it. It is not clear that there is such an interest or that the statute is narrowly tailored. If there is this interest, the decisions from which Kentucky derives it, *id.* at 14, would conflict with this Court's pronouncements in *NCPAC*. Removing this conflict is another reason to grant the petition.

narrowly tailored. He observed that simply because a few individuals might corrupt the political process by making large contributions, this does not warrant preventing many more individuals from making contributions that will not. *Id.* at 2329 (quoting Brief of Appellants in *Buckley v. Valeo*). Similarly, even if a few persons might use PACs to evade Kentucky's individual contribution limit, this does not mean that a $1,500 aggregate limit on all PAC contributions is narrowly tailored, particularly when Kentucky *directly* prohibits circumventing its individual contribution limits.

> That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored. . . . Similarly, that other modes of expression remain open to regulated individuals does not mean that a statute is the least restrictive means of addressing a particular social problem. A statute could, of course, be more restrictive than necessary while still leaving open some avenues for speech.

Id. In sum, this Court's more recent cases indicate that "[b]road prophylactic bans on . . . contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their strictures." *Id.* "*Buckley's* rationale for the contrary conclusion" – the same rationale upon which Kentucky relies – "is faulty." *Id.* This Court should grant the petition to bring *Buckley* into conformance with *Citizens Against Rent Control* and *MCFL*.[5]

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[5] Kentucky asserts that in approving Ky. Rev. Stat. § 121.150(10) as a prophylactic measure, the Sixth Circuit followed *Buckley's* comments that such measures may prevent not only circumvention of individual contribution limits through earmarked contributions, but through "unearmarked contributions to [PACs] likely to contribute to that candidate." *Opposition* at 17 (quoting *Buckley*, 424 U.S. at 38-39). The Court, though, was discussing a $25,000 cap on *all* contributions that it felt was a "quite modest restraint upon protected political activity," and that prevented "massive amounts of money [from going] to a particular

Finally, Kentucky asserts that under *Singleton v. Wulff*, 428 U.S. 106 (1976), KRL may not point out that Ky. Rev. Stat. § 121.150(10) is not narrowly tailored as a prophylactic measure in light of its direct prohibitions against circumvention (*see* Ky. Rev. Stat. §§ 121.150(8) & (9)), because "KRL did not argue this issue [below]." *Opposition* at 15-16. *Singleton* held that a party was required to raise issues, 428 U.S. at 120, not every conceivable *argument* and *counterargument* in support of an issue. Here, KRL is not raising an issue for the first time; it is not, as was the case in *Singleton*, arguing the merits when standing had always been at issue. *Id.* Rather, it is only listing another reason *why* an issue – whether the statute is narrowly tailored – should be decided in its favor. Because KRL has raised this issue, the Court should avoid Kentucky's smoke screen and proceed on course to the merits.

Assuming a party is required to present every conceivable argument in support of an issue, this is a discretionary rule that is used to prevent prejudice, such as when a party is unable to present evidence or argument. *Id.* at 120-121. Here, Kentucky has not suffered any prejudice, nor has it even argued any. KRL's challenge to Ky. Rev. Stat. § 121.150(10) is a preenforcement, facial challenge. It was decided on an agreed record (discussed *infra*) and involves questions of law. Kentucky had the opportunity to present whatever evidence it wanted, and at all times, including in this Court, it has been able to present all of its legal arguments. Indeed, Kentucky addressed, on the merits, KRL's argument that Ky. Rev. Stat. § 121.150(10) is not narrowly tailored because of more precise means. *Opposition* at 16-18. This case is thus a far cry from *Singleton*, where a party had never filed any pleadings on the merits, and in fact, "ha[d] never been heard in any way on the merits. . . . " 428 U.S. at 120.

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candidate. . . . " *Id.* A $1,500 aggregate limit on PAC contributions today is a much greater burden on First Amendment rights than a $25,000 cap on all contributions in 1976, and it is an overbroad means of preventing "massive amounts" of money from going to a candidate.

II. Kentucky Misreads The Case Law On The Evidentiary Requirements For Restricting PACs' Rights, And If It Has Not, There Is Confusion On This Issue, And The Petition Should Be Granted To Eliminate It.

Kentucky asserts that once an interest is held to be compelling *as a matter of law,* states may infringe upon First Amendment rights in future cases without ever demonstrating that the interest is implicated *as a matter of fact*, *Opposition* at 19; the Court will simply presume that the interest is implicated and that the means are narrowly tailored. *Id.* at 19-23.[6] Kentucky argues that *Turner Broadcasting System, Inc. v. Federal Communications Commission,* 114 S.Ct. 2445, 2470-2472 (1994) (plurality opinion), and *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995), support its assertion because there were issues of first impression in these cases. *Opposition* at 21-22. The Court, however, never *said* that it was requiring the government to justify the regulations with evidence or legislative findings only because they involved "new" topics. Thus, if these cases stand for this proposition, the Court should grant the petition to clarify this point.[7]

Kentucky also asserts that the Sixth Circuit's decision does not conflict with *Carver v. Nixon,* 72 F.3d 633 (8th Cir.

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[6] Assuming this is the rule, the Sixth Circuit still failed to follow precedent because this Court has never upheld an aggregate limit *only* on contributions to PACs. Thus, Kentucky was required to show that the restriction was necessary and that it was narrowly tailored.

[7] Kentucky also cites *Florida Bar v. Went For It,* 115 S.Ct. 2371 (1995). *Id.* at 20. However, the portion upon which it relies only says that *there* the State had met its evidentiary burden. *After making this showing*, the Court held that the "empirical data" with which the state came forth did not have to be "accompanied by a surfeit of background information." *Id.* at 2378. Such *additional* evidence was not required. Unlike the Sixth Circuit, *Went For It* did not hold that the state need not offer *any* evidence to justify restricting First Amendment rights. Indeed, although *Went For It* involved commercial speech – not political speech and association like this case – and thus was subject to lesser scrutiny, the Court still required the State to demonstrate the need for the restriction.

1995), because, since *Carver* involved a referendum, it did not address whether courts should defer to a legislature as they do to Congress. *Opposition* at 23-24. For two reasons, this argument is a straw man. First, and as *Carver* noted, 72 F.3d at 644, while courts may defer to Congress, they still require it to produce *some* evidence to justify restricting First Amendment rights.[8] Here, Kentucky did not produce *any* evidence to justify discriminating against PACs. Second, *Carver* conflicts with this case because there the Eighth Circuit *broadly* said that a state must justify restricting First Amendment rights. Indeed, because *Carver* also noted that a legislature, no more so than the people, may violate the Constitution, *id.*, it is difficult to believe – particularly in light of its broad statements – that the Eighth Circuit would hold the opposite for legislation.[9]

Finally, Kentucky again attempts to avoid the merits by alleging that KRL somehow duped it into not putting forth any evidence when the district court, *sua sponte,* consolidated KRL's motion for a preliminary injunction with a trial. *Opposition* at 18-19. Kentucky essentially argues that KRL had a duty to advise Kentucky that it should support the statute with

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[8] *Turner Broadcasting,* for example, said (in a passage omitted by Kentucky) that while "Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated altogether from meaningful judicial review . . . [and particularly when First Amendment rights are at issue, the Court's job] is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner,* 114 S.Ct. at 2471.

[9] *Rosenstiel v. Rodriguez,* 101 F.3d 1544 (8th Cir. 1996), *Opposition* at 24-25, involved public financing of speech. A *subsidy* of speech, not a burden on speech, was thus at issue. 101 F.3d at 1553. Because in *Rosenstiel* there was no burden on First Amendment rights, *Regan v. Taxation With Representation Of Washington,* 461 U.S. 540, 546 (1983), it is a red herring for Kentucky to note that the Eighth Circuit did not require the state to justify this *non*-burden. Further, the portion of *Rosenstiel* that Kentucky cites is *dictum.* The Court had already held "that the challenged provisions do not burden First Amendment rights is a sufficient basis to affirm the judgment." 101 F.3d at 1553. Thus, *Rosensteil* does not remove the conflict between *Carver* and the Sixth Circuit.

legislative findings or other evidence and that because KRL did not do so, it may not point out Kentucky's failure to put forth such facts. *Id.* The first assertion is untrue as a matter of fact; the second is astounding as a matter of law.

First, KRL *moved* for consolidation two weeks before the preliminary injunction hearing, Reply App. 1, and Kentucky did not object to it. *Id.* at 6. The district court did **not** "spring" consolidation on it. Further, *KRL* did not "advise[ ] the District Court 'that there was no need for testimony or anything in the record' and that the material facts were agreed to by the parties." *Opposition* at 18. Kentucky is quoting the *District Court*. Supp. App. 2. KRL responded to the court's query, "That's our understanding, Your Honor." *Id.* KRL was thus simply saying it understood that neither side was going to introduce evidence at the hearing or dispute the facts that were on already record. In fact, Kentucky agreed to this. *Id.* (stating "I think that's correct."). Second, KRL does not have the duty, much less the ability, to conduct Kentucky's case. It is not privy to Kentucky's strategy or to what, if any, evidence is available. KRL did not dupe Kentucky. To use as a litigation tactic the suggestion that it did, and in the process imply that KRL violated some duty, is, to say the least, unwarranted.

CONCLUSION

For these reasons, and those the petition for writ of certiorari sets forth, the Court should grant the petition.

Dated: September 9, 1997

Respectfully submitted,

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APPENDIX

PETITIONERS' REPLY APPENDIX

Plaintiffs' Verified Motion For Preliminary Injunction And Consolidation With Trial On Merits, dated October 2, 1995 ..... App. 1

Defendants' Response To Plaintiffs' Verified Motion For Consolidation With Trial On Merits, dated October 16, 1995 ..... App. 6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

KENTUCKY RIGHT TO LIFE, INC., et al., *Plaintiffs,*	)	
v.	)	**CAUSE NO. 3:95CV-582-H**
NICHOLAS KING, in his official capacity as Commonwealth Attorney for Jefferson County, Kentucky, and as a representative of the class of Commonwealth Attorneys in the State of Kentucky, CHRIS GORMAN, et al., *Defendants.*	)	

VERIFIED MOTION FOR PRELIMINARY INJUNCTION AND CONSOLIDATION WITH TRIAL ON MERITS

(Filed Oct. 2, 1995)

Come the Plaintiffs, Kentucky Right to Life, Inc., Kentucky Right to Life Political Action Committee (KRLPAC), Robert Zoeller, and Lora Robertson, Treasurer of KRLPAC, by counsel, and pursuant to Federal Rule of Civil Procedure 65(a)(2), respectfully move the Court to preliminary enjoin the Defendants from enforcing KRS §§ 121.025, 121.035(2), 121.190(1), 121.180(6)(a), 121.180(6)(b), 121.150(6), 121.150(10), 121A.030(4), and 121A.050(1), and to consolidate the hearing on the Plaintiffs' Motion for Preliminary Injunction with the trial on

the merits of Plaintiffs' Verified Complaint. In support of their motion, the Plaintiffs state as follows:

1. The Plaintiffs have filed their Verified Complaint for declaratory judgment and preliminary and permanent injunctive relief.

2. Contemporaneous with the instant motion for preliminary injunctive relief, the Plaintiffs have filed their memorandum in support thereof. In said motion, the Plaintiffs request the Court to preliminarily enjoin the aforementioned provisions of the Kentucky election laws in Chapter 121 of the "Campaign Finance Regulations," KRS § 121.010 et seq., and Chapter 121A of the "Public Financing Campaign Act," KRS § 121A.005 et seq., on the ground that they violate the First and Fourteenth Amendments to the United States Constitution by unduly impinging upon protected political speech and associational rights and by denying the Plaintiffs the equal protection of the laws.

3. As discussed in the accompanying brief, the Plaintiffs have suffered, and will continue to suffer, the irreparable harm of their First Amendment rights if the aforementioned provisions are not preliminarily enjoined.

4. Furthermore, as discussed in the accompanying brief, the Plaintiffs will likely succeed on their claims, and their challenges to the aforementioned provisions raise serious questions going to the merits of their claims.

5. The Plaintiffs are willing to provide security as the Court deems proper; however, because of the

unlawfulness of the provisions at issue, and the concomitant likelihood that the Plaintiffs will succeed on their claims, such security, if required, should be nominal.

6. Because the evidence submitted at trial or on summary judgment will be identical to the evidence presented at the hearing on the Plaintiffs' Motion for Preliminary Injunction, consolidating this hearing with a trial on the merits will save judicial resources.

WHEREFORE, the Plaintiffs respectfully move the Court as follows:

a. To set a hearing on Plaintiffs' Motion for Preliminary Injunction at the earliest possible date and to consolidate said hearing with a trial on the merits of Plaintiffs' Verified Complaint; and

b. Following such a hearing and trial, to issue an order preliminarily or permanently enjoining: KRS §§ 121.025, 121.035(2), 121.190(1), 121.180(6)(a), 121.180(6)(b), 121.150(6), 121.150(10), 121A.030(4), and 121A.050(1).

VERIFICATION

I affirm under the penalties for perjury that the foregoing statements are true. Dated: September 30, 1995.

/s/ John K. Abegg
John K. Abegg

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 1995, a true and complete copy of the foregoing was served upon the Defendants by depositing a copy of the same in the United States Mail, first class, postage pre-paid, at the following address:

Sheryl G. Snyder
Jacquelyn P. Elmore
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/s/ Terry E. Fox
Terry E. Fox

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

KENTUCKY RIGHT TO LIFE, et al. Plaintiffs v. NICHOLAS KING, et al. Defendants	)	CIVIL ACTION NO. 3:95CV582-H

DEFENDANTS' RESPONSE TO PLAINTIFFS' VERIFIED MOTION FOR CONSOLIDATION WITH TRIAL ON MERITS

(Filed Oct. 16, 1995)

The Defendants, Commonwealth Attorney Nicholas King, Attorney General Chris Gorman and Registry of Election Finance members Joseph H. Terry, Caroline S. Bratt, Victor B. Maddox, Geoffrey C. Ralston, William T. Warner, Brenda W. Willoughby and Betty Joe Winters, (collectively "defendants"), hereby respond to Plaintiffs' Verified Motion for Consolidation With Trial on Merits. Because this action presents only facial challenges to the constitutionality of the election statutes, the questions presented to this Court are purely matters of law and, therefore, can adequately be decided by the Court on submission of briefs by the parties.

Defendants, therefore, do no [sic] object to Plaintiffs' Verified Motion For Consolidation With Trial on Merits.

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

This is to certify that a true copy of this Response to Plaintiffs' Verified Motion for Consolidation With Trial on Merits was served upon Plaintiffs by facsimile and by mailing a copy of same, United States mail, postage prepaid, to the lead counsel of record, James Bopp, Jr. and John K. Abegg, Bopp, Coleson & Bostrom, 2 Foulkes Square, 401 Ohio Street, P.O. Box 8100, Terre Haute, IN 47808-8100; and by hand delivery to local counsel, Terry

E. Fox, Suite 490, Starks Bld., Louisville, KY 40202 this 16th day of October 1995.

/s/ Jacquelyn P. Elmore
One of Counsel for
Defendants